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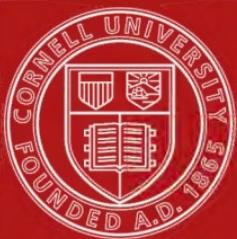
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THE LAW  
OF  
STREET SURFACE RAILROADS

AS COMPILED FROM

STATUTES AND DECISIONS IN THE VARIOUS STATES AND TERRITORIES SHOWING THE MANNER OF ORGANIZING CORPORATIONS TO CONSTRUCT AND OPERATE STREET SURFACE RAILROADS, THE ACQUISITION OF THEIR FRANCHISES AND PROPERTY, THEIR REGULATION, ETC., BY STATUTE AND MUNICIPAL ORDINANCE, THEIR RIGHTS AND LIABILITIES BOTH AS TO OTHER USERS OF THE STREETS AND HIGHWAYS AND AS TO PASSENGERS AND EMPLOYEES.

BY  
ANDREW J. NELLIS,  
OF THE NEW YORK STATE BAR.

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MATTHEW BENDER.  
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## P R E F A C E.

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The increase in the surface railway mileage, and the great number of street railroad decisions made during the last ten years it is believed warrants the issuing of this volume, which it is hoped will in a measure fill the growing demand for a work on this subject.

The writer has endeavored to put together in convenient form and under a logical arrangement an epitome of the judicial decisions relating to street railways, the aim being to make the book a time and labor saver, and a work of ready reference for the active practitioner, and one also that would be useful to the student who desires to become acquainted with the law of street surface railroads from the organization to the dissolution of the corporation.

It is claimed for this work that it contains a survey of the entire field of the law, that in it there is gathered together, classified and arranged, a mass of precedent directly involving street surface railroad corporations, their organization, acquisition of franchises and other property, construction and maintenance of railroad, and their rights and duties in relation to other users of the public streets and highways, and also to their passengers and employees, which will be of use to busy lawyers.

The writer has the utmost confidence that the work will be found a useful one, because it contains no ideas of his own; rather a digest of the decisions, and statements of the reasons therefor, when such statements are given, in the

words, as nearly as may be, of the court giving them utterance. There is here brought together, in a more or less systematic manner, the authorities upon points which are likely to arise in one's daily practice.

Street railroads are creatures of the statute, and yet the statutes of the several States upon the subject are so similar in substance that a decision in any State is useful to the practitioner in any other State. Without further comment the work is placed before the profession for its approval.

ANDREW J. NELLIS.

JOHNSTOWN, N. Y., *June 1, 1902.*

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# THE LAW OF STREET SURFACE RAILROADS.

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## CHAPTER I.

### The Right to Construct and Operate Street Surface Railroads; How Granted and Controlled by the Legislature.

- SECTION
- 1. What are street railroads?
  - 2. To whom the right to operate may be granted.
  - 3. Location not confined to streets.

#### The Charter.

- 4. A delegation of sovereign authority.
- 5. Conditions prescribed by Constitution or annexed to grant; time limit of grant.
- 6. Authority delegated only for a public use.
- 7. The delegated authority not to be implied.
- 8. Curative act validating exercise of authority.
- 9. Charter a contract; how construed.
- 10. Amendment or repeal of charter.
- 11. Forfeiture or annulment of charter.
- 12. Legislative control of streets.

§ 1. **What are street railroads?**— Street railroads are railroads constructed upon streets or highways for the purpose of facilitating the use thereof in the transportation of persons and property.<sup>1</sup> The difference between them and rail-

1. *State v. Dayton Traction Co.*, 18 Ohio Cir. Ct. 490, 10 O. C. D. 212. It has been held that the designation "street railways" is to be confined to passenger carriers exclusively. *Carli v. Stillwater St. R., etc., Co.*, 28 Minn. 373, 10 N. W. 205, 3 Am. & Eng. R. Cas. 226, 41 Am. Rep. 290. Street railroads are not carriers of goods except under special circumstances. *Thomson-Houston Elec. Co. v. Simon*, 20

Oreg. 60, 47 Am. & Eng. R. Cas. 51, 25 Pac. 147. A street railroad company was held liable for the loss of merchandise delivered for transportation to one of its conductors and carried upon the platform of a passenger car, for money paid by owners of goods to conductor, upon proof that two other persons had before then paid conductors for like transportation of goods, with the knowledge of the

roads for general traffic consists in their use, not in their motive power. A railroad, the rails of which are so laid as to conform to the grade of the street, and which is otherwise so constructed that the public is not excluded from the use of any part of the street as a public highway, the cars upon which are propelled at a moderate rate of speed, compared with the speed of traffic railroads, at short intervals, carrying only passengers from one part of a thickly populated district to another, in a town or city and its suburbs, stopping at every street crossing to receive and discharge passengers, is a street surface railroad, no matter whether the cars are propelled by animal or mechanical power.<sup>2</sup> It is none the less a street surface railroad when it is organized under the Surface Railroad Law, although it chooses to pass for a portion of its route over its own property and not within the bounds of the public highways.<sup>3</sup> But a railroad constructed in the

superintendent of the road. Levi v. Lynn, etc., R. Co., 11 Allen (Mass.), 300, 87 Am. Dec. 713.

2. Williams v. City El. St. Ry. Co. (C., C. E. D. Ark.), 41 Fed. 556, 43 Am. & Eng. R. Cas. 215, 7 R. R. & Corp. L. J. 448. A railroad on private land just inside the fence along a turnpike road, and not upon a street or highway, is not within the Pennsylvania statute providing for the formation of street railway companies. Gay v. Bristol, etc., Co. (C. P.), 22 Pa. Co. Ct. 465. But under Pennsylvania act of May 14, 1889, electric railways are not limited to building their lines upon streets or roads within boroughs or cities. Conshohocken v. Pa. Ry. Co. (C. P.), 15 Pa. Co. Ct. 45.

3. Matter of Syracuse & South Bay R. Co., 33 Misc. Rep. (N. Y.) 510, 514; Gettysburg Battlefield Assn. v. G. El. R. Co. (Pa. Atty.-Gen.), 2 Pa. Dist. 659. A local passenger railroad built along a turnpike outside the city limits, under a contract purchasing the privilege from the turnpike company, and for which no street franchise of any kind whatever has been conferred by the city, does not, upon the extension of the city limits to include a portion of the road, become "a street railway" within the Maryland laws, imposing a park tax of 9 per cent. upon gross receipts from all street railway lines within the city limits. Baltimore v. B. C. & E. M. Pass. R. Co., 84 Md. 1, 35 Atl. 17, 33 L.

country and without regard to roads, for a considerable distance, for transporting persons from one city to another, is rural rather than urban, though it confine its business to carrying passengers only, and is operated by a street railroad company.<sup>4</sup> Street railroads may occupy every street in a city and iron the whole surface, or spin their webs in the air over every avenue, or undermine the entire system of city streets. They may be under or elevated above the surface of the streets and still be street railroads in those streets.<sup>5</sup> They are public highways in themselves and may exclude all other means of transit over the route.<sup>6</sup> In the absence of statutes circumscribing their powers, the persons or corporations operating them may carry property, freight, as well as passengers.<sup>7</sup> Ordinarily, the statutes authorizing

R. A. 503. And see New Orleans City & L. R. Co. v. Watkins, 48 La. Ann. 1550, 21 So. 199.

4. Hanna v. Met. St. R. Co., 81 Mo. App. 78.

5. So stated in a case holding that the consents of abutting owners as well as of local authorities were necessary to the construction of an underground street railroad. Matter of N. Y. Dist. R. Co., 107 N. Y. 42, 52, 32 Am. & Eng. R. Cas. 202, 14 N. E. 187.

6. Sun Pub. Assn. v. Mayor, 152 N. Y. 257, 46 N. E. 499.

7. State v. Dayton Traction Co., 18 Ohio Cir. Ct. 490, 10 O. C. D. 212.

Under the acts authorizing the construction of railroads in New York, passed in 1848 (chap. 140) and 1850 (chap. 140), street surface railroads are not mentioned in terms; and the acts provided for the carriage of passengers and

freight; but the grant to street surface railroads incorporated thereunder was frequently held to carry the right to convey both passengers and freight upon the constructed line. *De Grauw v. Long Island El. R. Co.*, 43 App. Div. (N. Y.) 502, 505, 60 St. Rep. (N. Y.) 163; affd., 163 N. Y. 597, 57 N. E. 1108. And see *Nichols v. Ann Arbor, etc., Co.*, 87 Mich. 361, 49 N. W. 538; *Clement v. Cincinnati*, 16 W. L. B. 355. A street railroad may be organized in a city street in Texas under Laws 1897, chap. 130, pp. 188, 189, to transport freight. Such purpose is consistent with the purposes for which streets exist, and an abutting property-owner is not entitled to have such use enjoined or declared a nuisance. *Aycock v. San Antonio Brewing Assn. (Tex. Civ. App.)*, 63 S. W. 953.

their use expressly conferred power to convey persons and property in cars for compensation.<sup>8</sup> Frequently however,

8. For illustration, see N. Y. Railroad Law, chap. 565, of 1890, art. IV, § 90; 3 Heydecker's Gen. Laws (2d ed.), 3306.

Authority to construct and operate a street railroad confers no power to construct and operate a railroad for the purpose of transferring freight cars. *South & N. A. R. Co. v. Highland Ave. & B. R. Co.*, 119 Ala. 105, 24 So. 114.

The section cited authorizes the construction of street surface railroads, under restrictions, "for public use in the conveyance of persons and property for compensation." Under the Railroad Law of 1850, it was held that corporations might be legally formed for the transportation of passengers or freight, or both, over railroads in the streets of cities where horses were to be the motive power, excepting the city of New York. *Matter of Wash. St. Asylum & P. R. Co.*, 115 N. Y. 442, 22 N. E. 356; *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93, 26 N. E. 25. Construing the words quoted above, it has been held that they allow street surface railroads to operate cars designed and intended exclusively for carrying express matter, freight, or property, and used exclusively for that purpose. *De Grauw v. Long Island El. R. Co.*, 43 App. Div. (N. Y.) 502, 60 St. Rep. (N. Y.) 163; *affd.*, 163 N. Y. 597, 57 N. E. 1108. In deciding the question, the court, per HATCH, J., said: "By familiar rules therefore we must hold that the authority ex-

isted when this contract was made to convey both passengers and freight over the defendant's lines and to contract for cars to run thereon for the exclusive carriage of passengers and for the exclusive carriage of freight. Such is the language of the statute. It is said that this language must be cut down, and the right to convey property must be read in connection with the passenger, as though it said 'passengers with property.' It is not reasonably conceivable that the legislature had such intention. In the ordinary carriage of passengers upon street railroads it has never been thought that passengers carrying small articles or such baggage as may be carried by hand was the occasion for the use of the word 'property' as used in the statute. The regulation for the carriage of such property, that which accompanies the passenger, even upon commercial roads, is usually by rule of the company and not by statute; it stands upon a different footing from the carriage of other property, and by common acceptation is usually denominated baggage, or, to adopt the English expression, luggage, meaning in popular phrase that which is carried by the person. No such limited meaning is to be ascribed to language deliberately used in a statute, where the interpretation placed upon it was as discriminating freight quite independent of passage by its owner. Certainly no one would have supposed that the

both in general and special laws, the power is limited to the carriage of passengers only.<sup>9</sup> Ordinarily, too, it is provided by statute that the road, or any part thereof, may be operated by animal or horse power, or by cable, electricity, or any power other than locomotive steam power.<sup>10</sup> In short, street railroads are creatures of legislation; and in the absence of constitutional restriction, they may be organized to be operated for the transportation of passengers, or freight, or both, by the use of any motive power.<sup>11</sup> And it is not probable, since their right in a street is subordinate to the rights of the public therein, that such use will result in the operation upon the public thoroughfares of long trains for the transportation of freight, passengers, or property.<sup>12</sup>

Johnstown and Gloversville Railroad Company was violating its charter by the carriage of a handbag, accompanied by its owner, and yet it was prohibited from carrying anything except persons or passengers."

9. See special laws cited in *De Grauw Case*, *supra*, p. 504.

10. For illustration, see N. Y. Railroad Law, chap. 565 of 1890, art. IV, § 100, as amended by chap. 676 of 1892, chap. 584 of 1899, chap. 679 of 1900, and chap. 533 of 1901; 3 Heydecker's Gen. Laws (2d ed.), 3317.

11. But the right to propel cars by steam through city streets is not to be implied, and may be prohibited by a municipality under its charter. Richmond, etc., R. Co. v. Richmond, 26 Gratt. (Va.) 96.

12. *De Grauw v. Long Island El. R. Co.*, 43 App. Div. (N. Y.) 502, 508, *supra*. In the case cited the court said: "It is undoubt-

edly true that the defendants, as to whatever right they have acquired to transport passengers, or freight, or property, have a vested right which may not be defeated or impaired by legislation. Such is the effect of the decisions. (*Ingersoll v. Nassau Electric R. Co.*, 157 N. Y. 453; *Roddy v. Brooklyn City & Newtown R. Co.*, 32 App. Div. [N. Y.] 311.) But we do not apprehend that such fact, nor our present construction of the statute will entail all of the evils which the appellant insists must follow in the train of such result. It can never happen that the right of use conferred by the franchise granted street surface railroads will result in the operation of long trains for the transportation of either passengers or property. Commercial railroads do not furnish a parallel of use. The latter are constructed upon the property of the corporation over which, except for purposes of crossing and otherwise in

Whether the General Railroad Law is applicable to street railroads must be determined in every case from the purpose

a very limited way, the general public do not travel, and have thereon, except for purpose of transportation, no right. This condition is created for the express purpose of furnishing facilities for the hauling of long consolidated trains, which may be operated for the reason that all else is excluded except such operation. The grant of power to these corporations was conditioned upon the creation of such surroundings as would enable them to so operate without detriment to the public, and without interfering or trespassing upon its rights. No such conditions surround a street surface railroad; the use of the street by the railroad is subordinate to the right of the public therein. In the struggle which is going on for the transportation of persons and property, it must be confessed that street surface railroads are not backward in the assertion of all the rights which the grant of power confers. But the law is, and the courts may be relied upon to enforce the law, that the right of use of the street by the public is first and primary; the right of use by the street surface railroad is secondary and subordinate. It has the paramount right of use of its tracks, but not the exclusive use, and when the right of the public or an individual member of it requires the use of the street for a proper purpose, the right of the railroad company must yield thereto, even though the effect be, for the time, to stop the operation of its cars thereon.

(*Black v. Staten Island E. R. Co.*, 40 App. Div. [N. Y.] 238.)"

Prior to 1855 a railroad company was authorized to propel its cars by steam power upon Atlantic avenue in Brooklyn, N. Y. In 1859, under statute authority and upon consideration paid by property benefited, it relinquished the right to use steam. In 1876 it was again authorized to use steam and resumed the use thereof. In 1874, art. III, § 18, was added to the Constitution, providing that the legislature shall not pass a private or local bill granting to any corporation, association, or individual, the right to lay down railroad tracks, or to any private corporation, association, or individual, any exclusive privilege, immunity, or franchise whatever, and that no law should authorize the construction or operation of a street railroad, except upon the condition that the consent of the owners, etc., be had. It was held that this constitutional provision was prospective in its operation and had no reference to, or effect upon, previously existing laws. That when in 1876 the restriction upon the use of steam was removed, the original charter power was left in full force, and that the State could not restrain the use of steam upon the company's road in the avenue, and that the question whether the removal of the restriction was violative of the constitutional prohibition against legislation impairing the obligation of a contract could not be presented in

and intent of the statute.<sup>13</sup> In a recent case in California it was held that street railroad companies are not railroad or transportation companies within the meaning of the Constitution, art. XII, § 22, defining the judgment and jurisdiction of the railroad commission and authorizing it to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies.<sup>14</sup>

an action brought by the State to which the assessed landowners, who alone had contract rights, if any existed, were not parties. *The People v. Brooklyn F. & C. I. R. Co.*, 89 N. Y. 75.

13. A statute requiring all trains to stop within 100 feet of the intersection of two railroads includes a local line in a highway. *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 200, 9 So. 320; *Katzenberger v. Lawo*, 90 Tenn. 235, 16 S. W. 611. An act authorizing the consolidation of railroads was held to include street railroads. *In re Wash. St., etc., R. Co.*, 115 N. Y. 442, 40 Am. & Eng. R. Cas. 538, 22 N. E. 356; *Hestonville R. Co. v. Philadelphia*, 89 Pa. St. 210. A statute for consolidation of railroads held not to apply. *Gyger v. Philadelphia, etc., R. Co.*, 136 Pa. St. 96; *Shipley v. Continental R. Co.*, 13 Phila. (Pa.) 128; *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1. The act making the real estate of "any railroad company" subject to certain statutes held applicable to street railroads. *Citizens' Pass. R. Co. v. Pittsburg*, 104 Pa. St. 522, 17 Am. & Eng. R. Cas. 438.

A statute in Massachusetts pro-

vided that any corporations created by the State, "except railroad and banking corporations," might institute proceedings in insolvency. The exception was held to embrace street railway corporations. The court, per GRAY, J., said: "A 'horse railroad company,' or, as it is more frequently and more properly called in recent statutes, a 'street railway corporation,' has all these attributes, and is none the less a 'railroad corporation,' less public in its character, or more fit to have its franchise and property transferred to assignees under proceedings in insolvency, because it more generally uses horses instead of steam power to draw its cars, and lays its rails over land already devoted to the public use for a street or highway, and is therefore made by statute peculiarly subject, in the location and use of its tracks, to the regulations of municipal authorities. (*Central Nat. Bank v. Worcester H. R. Co.*, 13 Allen [Mass.], 105.)"

14. *Railroad Comrs. v. Market St. Ry. Co.*, 53 Cent. L. J. 268 (No. 14, Oct. 4, 1901), 64 Pac. 1065. The case also decided that a legislative interpretation of a

§ 2. To whom right to operate may be granted.—In the absence of constitutional prohibition, the legislature may give to individuals and their assigns the right to construct and operate a street surface or other railroad. And such railroad will be deemed to be constructed and operated for public use. The legislature may, in the absence of such prohibition, delegate to individuals and their assigns the right of eminent domain as well as to corporations or joint-stock companies.<sup>15</sup> But natural persons cannot exercise the

constitutional provision contemporaneous with its adoption might be considered by the courts in an interpretation of a doubtful provision thereof, and held that street railroad companies were expressly excepted from the act defining transportation companies as including all companies owning and operating railroads other than street railroads. In the opinion of COOPER, C., the following appears: "But, independent of a contemporaneous interpretation so given to the Constitution by the legislature, we think the interpretation correct, and that the words 'railroad company' were not intended to mean street railway. In the ordinary acceptation of the term 'railroad company' or 'railroad,' it is not understood to mean a street railway engaged in the business of carrying passengers the entire distance, or any part of the distance, over which the road runs, for one and the same fare." In Georgia it is held that though the general assembly had in 1891 no power to confer on street car companies the authority to become common carriers of freight, the grant of such author-

ity would not in any way affect other powers which had been lawfully granted to such companies (*Brown v. Atlanta R. & P. Co.*, 39 S. E. 71. *Rev. Stat.*, §§ 2780-17 [92 Ohio Laws, 17]) classify suburban and interurban railroads with street railroads. They therefore are governed by the laws relating to street railroads. *Cincinnati, etc., St. Ry. Co. v. Cincinnati H. & I. R. Co. (Ohio)*, 12 O. C. D. 113.

15. *Matter of Kerr*, 42 Barb. (N. Y.) 119, 25 How. Pr. (N. Y.) 258. In *New York & H. R. Co. v. Forty-second St., etc., R. Co.*, 50 Barb. (N. Y.) 309, 311, the court said: "There is no constitutional provision that prohibits such franchise being conferred upon or exercised by individuals; nor does there appear to be any objection to making such rights assignable. The legislature had the power to grant this franchise. The expediency and necessity of granting, the propriety of granting it to a corporation, or a set of individuals, and their assigns; the safeguards and restrictions to be placed upon the use,—are all, unless some constitutional inhibition

franchises which the State has conferred upon railroad corporations; they may however be the conduit for transmitting them to another corporation in the manner provided by law; they may bid in the property at a foreclosure sale, including the franchises, and hold and transmit it intact to a corporation authorized to exercise them.<sup>16</sup> A railroad for private use may not be laid in a city street, even with the consent of the city. Any abutting lotowner whose lot is or may be injured may have a perpetual injunction.<sup>17</sup> A

is violated, entirely in the discretion of the legislature. And see *Henderson v. Ogden City Ry. Co.*, 7 Utah, 199, 26 Pac. 286, 46 Am. & Eng. R. Cas. 95; *Budd v. Multnomah St. Ry. Co.*, 15 Oreg. 404, 15 Pac. 654, 40 Am. & Eng. R. Cas. 551, 3 Am. St. Rep. 169. Where a municipal council had granted the right to lay street railroad tracks, and the ordinance had been confirmed by the legislature, it was held immaterial whether the grant of such right constituted a corporation or only a partnership. *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787.

The word "purchasers" in Alabama Code authorizing purchasers at a judicial sale of a street railroad franchise to organize as a corporation embraces subpurchasers. *Birmingham Ry. & El. Co. v. Birmingham Traction Co.*, 29 So. 187.

16. *Parker v. Elmira, etc., R. Co.*, 165 N. Y. 274, 281.

17. *Mikesell v. Durkee*, 34 Kan. 509, 9 Pac. 278.

The corporate authorities of New York city have the control of the streets of that city in trust. The use of those streets is to be

limited or extended for the public benefit from time to time as occasion might require; and the corporate powers in this regard can neither be delegated to others, nor effectually abridged by any act of the corporate authorities. Power cannot be conferred upon individuals, by contract, for an indefinite period, to construct and operate a railroad in the public streets for their private advantage. Such power would seem to amount to a freehold interest in the soil of the streets. *Milhaw v. Sharp*, 27 N. Y. 611. And see *People v. Kerr*, id. 188; *Presbyterian Church v. Mayor, etc.*, 5 Cow. (N. Y.) 538; *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593; *Potter v. Collis*, 156 N. Y. 16, 50 N. E. 413. A street railway franchise granted by a city is null and void, where it was intended for private and not for public purposes. And the defect is not cured because the immediate purpose of the persons who procured it was to transfer the same to another party. *San Antonio v. Rische* (Tex. Civ. App.), 38 S. W. 388.

A private corporation, in the absence of either legislative or mu-

municipality itself may build and operate a railroad, and such railroad is a highway and may properly be deemed to be for a public purpose within the meaning of the provision of the Constitution which prohibits cities from incurring any indebtedness except for a city purpose.<sup>18</sup>

nicipal permission, has no right to impose a permanent structure on a highway and thereby sequester to its exclusive use and for its exclusive profit any portion thereof. *Stamford v. Stamford R. Co.*, 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375.

Where a municipality authorizes the construction of a railroad track in a way to connect a private manufacturing establishment with other railroad tracks, it becomes a public highway, and the city council may devote a portion of it to that use. The remedy of persons sustaining injuries thereby is at law, and chancery cannot control the manner in which the right should be exercised. *Parlin v. Mills*, 11 Ill. App. 396.

A railroad corporation formed by only three persons, under a statute providing that corporations may be created by three or more persons for the purpose of constructing and operating street railroads in cities and towns for the transportation of freight and passengers, is not such a corporation as is contemplated by another statute requiring not less than ten persons as incorporators of a railroad company. *Aycock v. San Antonio Brewing Assn.* (Tex. Civ. App.), 63 S. W. 953.

18. *Sun Pub. Assn. v. Mayor*, 152 N. Y. 257, 46 N. E. 499. The case cited established the validity

of what are called the Rapid Transit Acts (Laws 1894, chap. 752, Laws 1895, chap. 519, amending Laws 1891, chap. 4), which authorizes cities of over a million inhabitants to construct railroads therein, which should be deemed public highways, at their own expense, if so determined by the vote of a majority of the electors, and to issue bonds in payment therefor. As stated in the opinion, "The acts, in brief, create a rapid transit commission and provide that the commissioners shall, in case they deem it necessary, and upon the written request of the local authorities, proceed to locate a route and provide the plans and specifications for a railway through the city. That, after they shall have so located the route and provided the plans upon which the railway should be built, they may sell at public auction the right, privilege, and franchise to construct, maintain, and operate such railway; or, if the people shall determine by vote of a majority of the electors that such railway shall be constructed for and at the expense of the city, then the commissioners shall enter into a contract with any person, firm, or corporation best qualified in their opinion to fulfill and carry out the contract, for the construction of such road upon the route, and in accordance with the plans and

§ 3. Location not confined to streets.—The location of street railroads is not confined strictly to streets, so called, under a statute providing for their location on streets or highways.<sup>19</sup> They may be constructed in part through lands

specifications adopted. In case the road shall be built at the expense of the municipality, the officers of the city, upon requisition of the commissioners, are required to issue the bonds of the city, to the amount of \$55,000,000, payable in gold, with interest not to exceed 3½ per cent., free from taxes, with which to pay for such construction. It is further provided that the commissioners may also enter into a contract with the contractors for the building of the road, for the lease and operation of the same for a period not less than thirty-five years, nor more than fifty years, at a rental agreed upon, to be not less than the interest on the sum paid by the city for the construction, and 1 per cent. in addition, and that the same may be renewed from time to time, as the lease shall expire, upon such terms as shall be agreed upon; that in case of default in paying the annual rental provided for, or in case of the failure or neglect on the part of the contractors to faithfully observe and fulfill the requirements of the contract, the city, by its rapid transit commissioners, may take possession of the road and equipments, and as the agents of the contractors, either maintain and operate the road at their expense, and upon their liability, or enter into a new contract with other persons for its operation. The acts also provide

that in case the road shall be constructed by the municipality, it shall be and remain the absolute property of the city, and shall be deemed to be a part of the public streets and highways of the city, to be used and enjoyed by the public, upon the payment of such fares and tolls, and subject to such reasonable rules and regulations, as may be imposed and provided by the board of rapid transit commissioners." Judge HAIGHT also stated in his opinion in the case cited, that in recent years railroads have been constructed and come into general use, so that now a very large percentage of the transportation of the country is done upon these roads; and in the year 1893 465,000,000 persons were transported over the railroads in the city of New York. He said that they were not common highways in the sense that they are under the care and management of the municipality, but as to their purpose, which is the transportation of persons and property for the public, they are as distinctly highways as the ordinary street; and the fact that a uniform fee is charged for persons taking passage over them does not differentiate them from other highways. Page 265.

19. Pennsylvania Ry. Co. v. Greensburgh, etc., St. Ry. Co., 176 Pa. St. 559, 35 Atl. 122, 27 Pittsb. L. J. (N. S.) 134. Where a city

acquired by purchase which are outside the limits of streets and highways.<sup>20</sup>

#### THE CHARTER.

**§ 4. A delegation of sovereign authority.**—Municipal corporations have no authority, in the absence of a delegation of power by the legislature, to grant a street railroad company the right to lay tracks in the streets.<sup>21</sup> The authority

authorized a street railroad to lay its track along a street which ran through the yard of a steam railroad company, the latter had no ground of complaint justifying the issuing of an injunction. *Texas & Pac. R. Co. v. Posedale St. R. Co.*, 64 Tex. 80, 53 Am. Rep. 739.

A corporation will not be allowed to appropriate and construct a street railroad over a roadway which has been improved at private expense, when there are other roadways that will answer equally as well the purposes of the public. *In re Port Chester St. Ry. Co.*, 43 App. Div. (N. Y.) 536.

Where the statute permits it, a borough ordinance permitting, with the consent of the property-owner, a divergence from a highway for a quarter of a mile over private property and crossing the highway, cannot be questioned in a proceeding by residents and property-owners of the borough. *Keough v. Pittston*, etc., R. Co., 5 Lack. Leg. N. (Pa.) 242.

20. *Farnum v. Haverhill & A. St. Ry. Co.* (Mass.), 59 N. E. 755.

21. *Potter v. Collis*, 156 N. Y. 16, 50 N. E. 413. The city authorities have no power to grant the right except so far as they may be

authorized by the legislature, and then only in the manner and upon the conditions prescribed by the statute. *Davis v. Mayor, etc.*, 14 N. Y. 506; *Milhaw v. Sharp*, 27 id. 611; *People v. Kerr*, id. 188; *Detroit v. Detroit City Ry. Co.* (C. C. E. D. Mich.), 56 Fed. 857, 56 Am. & Eng. R. Cas. 337; *State, Jacksonville v. Jacksonville St. R. Co.*, 29 Fla. 590, 50 Am. & Eng. R. Cas. 179, 10 So. 590. Although the word "railroads," when used in a statute, will generally be construed to embrace street passenger railroads, in a statute which prohibits the consolidation of competing railroad and canal companies (construed in the light of the remaining sections of that article, as well as that of its manifest purpose) does not include such railroads. *Montgomery v. Philadelphia City R. Co.*, 136 Pa. St. 96, 20 Atl. 399, 9 L. R. A. 369, 8 Ry. & Corp. L. J. 462, 26 W. N. C. 437. Corporations for the construction of street surface railways in cities, organized under the enabling act of 1884, and the supplemental acts, derive all their powers from the State, and none from the city or village where they may carry on their operations. *People, West Side*

to make use of the public streets of a city for railroad purposes primarily resides in the State, and is a part of the sovereign power, and the right or privilege of constructing and operating railroads in the streets, which for convenience is called a franchise, must always proceed from that source, whatever may be the agencies through which it is conferred.<sup>22</sup> The legislative power, in this particular, is also subject to the limitation that the franchise must be granted for public, and not for private, purposes, or at least public considerations must enter into every valid grant of a right to appropriate a public street for railroad uses.<sup>23</sup> Street railroads are usually organized under the same laws applicable to railroads generally.<sup>24</sup> The legislature in nearly every State is required by the Constitution of such State to pass general laws for the formation of corporations. By these general laws, enacted under this requirement, cor-

St. Ry. Co. v. Barnard, 48 Hun (N. Y.), 57, 15 St. Rep. (N. Y.) 689; revd. on other grounds in 110 N. Y. 548, 18 St. Rep. (N. Y.) 542, 18 N. E. 254. A street railroad company's charter granted by the secretary of state, confirmed and validated by the legislature, is a charter by the legislature of the State, so that the railroad may cross the tracks of any other railroad under certain conditions. Southern Ry. Co. v. Atlantic Ry. & Power Co., 36 S. E. 873. The legislature can, without consulting the municipality, grant the right to a street railway company to lay its tracks on a street of the city. Central R. & D. Co. (App.), 67 Conn. 197, 35 Atl. 32; Paterson, etc., Horse R. Co. v. Paterson, 24 N. J. Eq. 158; Jersey

City v. Jersey City, etc., R. Co., 20 id. 360; Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co., 35 Barb. (N. Y.) 364; Harrisburg City Pass. R. Co. v. Harrisburg (Pa.), 24 Atl. 56; Chicago, etc., R. Co. v. Newton, 36 Iowa, 299; Milwaukee v. Milwaukee, etc., R. Co., 7 Wis. 85.

22. Beekman v. Third Ave. R. Co., 153 N. Y. 144, 152, 47 N. E. 277.

23. Fanning v. Osborn, 102 N. Y. 441, 447, 7 N. E. 307.

24. So a statute authorizing railroad companies to contract with each other for the use of their respective rights is applicable to street surface roads as well as to those operated by steam. Roddy v. Brooklyn City & N. R. Co., 32 App. Div. (N. Y.) 311, 52 N. Y.

porate franchises are not directly conferred; they simply provide the mode in which such franchises may be acquired by those desiring them.<sup>25</sup> Individuals desiring to incorporate under a general law, determine for themselves the necessity of a corporation, their corporate name, what business they will carry on, where they will transact it, the amount of their capital, and the duration of their corporation. In making such determinations they do not confer upon themselves corporate franchises. They simply act under, apply and carry into effect the law in reference to which legislative power has been properly evoked.<sup>26</sup> Outside of the powers conferred and the privileges granted to

Supp. 1025. And a street railroad is a railroad within a statute making it an offense to obstruct or injure any railroad. Commonwealth v. McCaully, 20 Pa. Dist. 63.

25. The power to grant special charters to street railroad companies, including authority to extend the line to a suburban terminus beyond the line of a city or town, is not taken away by a statute authorizing the secretary of state to issue certificates of incorporation to railroad companies. And the constitutional prohibition against the passage of special statutes where there is already in force a general law making provision for the same subject, as the act, does not apply to street railroads. Dieter v. Estill, 95 Ga. 370, 22 S. E. 622. Where a street railroad company gave public notice as to the streets, by name, on which it desired to lay tracks, and its petition repeated the list, and the legislature excluded one street asked for and added two others,

and granted leave to pass over certain other streets by name, the right is restricted to the streets named, notwithstanding the clause granting the privilege ends by saying "and over and across any highway within any of the points of commencing or termination aforesaid." Stamford v. Stamford R. Co., 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375. Under a legislative enactment prohibiting municipal corporations from giving consent to construct and operate a horse railroad until ten days' public notice of the time and place of presenting the petition shall have been given, the publication of the report of a committee recommending that leave be granted, ten days before the petition, by an ordinance authorizing such construction, is not a compliance with the statute. Metropolitan St. R. Co. v. Chicago, 96 Ill. 620.

26. Matter of New York El. R. Co., 70 N. Y. 327, 343.

these organizations by the statutes under which they exist, they are, in all the States of the Union which have the common law as the foundation of their jurisprudence, governed by that common law; and it is the established doctrine of the Supreme Court of the United States, and, with some exceptions, of the States in which that common law prevails, as well as of Great Britain from which it is derived, that such a corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislature which granted that charter.<sup>27</sup> Incorporated under general laws, the articles of association stand in the place of a legislative charter, and the powers of the corporation cannot exceed those enumerated therein. The incorporators may claim all that the law authorizes, or only a part, and when they make

27. Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. Ed. 837. Where the charter of a street railroad company authorized it "to locate, construct, and operate such railroad with cars propelled by electricity, in any mode that does not involve the use of overhead wires," but an earlier general statute empowered the municipal authorities to authorize the use of "any improved motive power" except steam upon street railroads, it was held that the powers of the company were limited by its charter, and the municipality could not permit it to use overhead wires, since the exception in the charter was equivalent to a positive prohibition. Farrell v. The Winchester Ave. R. Co., 3 Am. Electl. Cas. 85, 61 Conn. 127. The charter of a street railroad com-

pany will be strictly construed against the company. Citizens' St. R. Co. v. Africa, 100 Tenn. 26, 42 S. W. 485; People, Third Ave. R. Co. v. Newton, 112 N. Y. 396, 19 N. E. 831. In construing a grant of power, any ambiguity must operate against the grantee and in favor of the public; nothing is to be taken as given unless found in the grant or shown to be necessarily incidental thereto, and if not so found, it will be deemed to be withheld. Mayor v. Broadway, etc., R. Co., 97 N. Y. 275; Mayor v. M. R. Co., 143 id. 1, 37 N. E. 494. Effect must be given to the whole of the language used, if it be plain and do not lead to anything manifestly so unjust or absurd that it cannot be assumed the legislature really intended such result. Id.

their choice they must abide by it.<sup>28</sup> So, when a company expressly names the power it intends to use, it will be held to its choice until it obtain an amendment to its charter.<sup>29</sup> It is not doubted that the legislature has authority to charter a street surface railroad company, and grant the power to carry freight exclusively, or passengers exclusively, or unite the authority to carry both.<sup>30</sup> And whatever right the company has acquired under its charter to transport passengers, or freight, or property, is a vested right which may not be defeated or impaired by legislation.<sup>31</sup> Legislative authority to a street surface railroad company "to

28. Accordingly held, that where the articles of incorporation provide "that said railway is to be operated by horse power" the company, even with municipal consent, cannot change to the overhead trolley electrical system. Haines v. Railway Co. (Pa.), 4 Am. Electl. Cas. 42, 1 Pa. Dist. 506, citing Oregon Ry. & Nav. Case, *supra*. In Louisiana, in United States Circuit Court, it was held that a statute authorizing municipal authorities to permit the maintenance of "horse and steam railroads," committed to them the discretion to grant a street franchise to electric railways, the words "horse and steam" being intended as words of illustration rather than of limitation. Buckner v. Hart, 4 Am. Electl. Cas. 21, 52 Fed. 835; affd., 54 id. 925. In Pennsylvania, the statute of 1876, which permitted those operating passenger railways in cities of the first class to use other than animal power when authorized by municipal councils, was held to authorize the use of the overhead trolley

electrical system, and not to be unconstitutional as being local or special legislation. Reeves v. Philadelphia Traction Co., 4 Am. Electl. Cas. 24, 152 Pa. St. 153.

Authority to construct and operate a street railroad confers no power to construct and operate a railroad for the purpose of transferring freight cars. South & N. A. R. Co. v. Highland Ave., etc., Co., 119 Ala. 105, 24 So. 114.

29. Haines v. Railway Co., 4 Am. Electl. Cas. 42.

30. De Grauw v. Long Island El. R. Co., 43 App. Div. (N. Y.) 502.

31. Ingersoll v. Nassau El. Ry. Co., 157 N. Y. 453, 52 N. E. 545, affg. 89 Hun, 213; Roddy v. Brooklyn City, etc., R. Co., 32 App. Div. (N. Y.) 311, 314. In the last case cited the right to lease the road was involved, and the court held that the company had, under its charter, a right to lease its tracks, and the right thereby acquired by the lessee could not be thereafter taken away or limited, either by legislative enactment or constitu-

operate its cars by such motive power as it might deem consistent and proper," permits the company to use the electric trolley system, although it was unknown when the authority was conferred.<sup>32</sup>

**§ 5. Conditions prescribed by Constitution, or annexed to grant; time limit of grant.**— In most of the States, the construction and operation of street railroads are hedged about by law, in many instances organic or constitutional, and made dependent upon the will of local authorities and abutting property-owners. In New York the Constitution prohibits a private or local law granting to any corporation, association, or individual the right to lay down railroad tracks, and requires the legislature to provide for the building and operation of railroads by general laws. It also prohibits any law authorizing the construction or operation of a street railroad, except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or, in case the consent of such property-owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall deter-

tional change, except in the proper exercise of the right of eminent domain, or of the police power.

32. Paterson Ry. Co. v. Grundy, 4 Am. Electl. Cas. 173, 59 N. J. Eq. 213; Hudson River Telephone Co. v. Watervliet Turnpike & Ry. Co., 4 Am. Electl. Cas. 275, 135 N. Y. 393, 32 N. E. 148. Author-

ity to convey passengers "by any power other than by locomotive," authorizes the use of electricity. Gillett v. Chester, etc., Ry. Co. (Pa. C. P.), 4 Am. Electl. Cas. 160, 2 Pa. Dist. 450; Ogden City Ry. Co. v. Ogden City, 4 Am. Electl. Cas. 321, 7 Utah, 207, 26 Pac. 288.

mine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property-owners.<sup>33</sup> The legislature of a State may, and generally does, prescribe limitations upon the organization and operation of street railroads in addition to those provided by the fundamental law.<sup>34</sup> Generally, it delegates to the municipal authorities the power to impose

33. N. Y. Const., art. III, § 18. The construction and operation of street railroads are prohibited by constitutional provision in Alabama, Georgia, Pennsylvania, and South Dakota, without the consent of the local authorities; in Colorado, Illinois, Missouri, Montana, North Dakota, and Texas, without the consent of the local authorities having control of the streets or highways proposed to be occupied for the purpose; in Nebraska, without the consent of a majority of all the electors of the municipality who cast their ballots at the general election at which the proposition is and must be submitted. *State, Omaha St. Ry. Co. v. Bechel*, 22 Nebr. 158, 34 N. W. 342. Every State in some way restricts the formation of street railroad companies and makes the use of the highways by them depend, in some degree, upon the consent of the local highway authorities. The consent of the selectmen of a town in Massachusetts is not necessary to the construction of a street railroad upon a turnpike running through the town. *District Attorney v. Lynn, etc., Ry. Co.*, 16 Gray (Mass.), 242. An act authorizing the

construction and maintenance of a street railroad is not unconstitutional because it fails to provide means for paying damages to abutting owners in advance. *Lockhart v. Craig St. Ry. Co.*, 3 Am. Electl. Cas. 314, 139 Pa. St. 419. A private person cannot claim that the charter of a street railroad company is void for constitutional reasons, as the State, only, can inquire into the validity of the charter. *Taylor v. Portsmouth, etc., R. Co.*, 91 Me. 193, 39 Atl. 560.

34. The Georgia Constitution (art. III, § 7, par. 20) prohibited the legislature from authorizing the construction of a street railroad in a city or town without the consent of the corporate authorities. *Held*, that the action of such authorities upon an application for a street railroad franchise is the action of the State; and an ordinance granting such a franchise is passed under authority delegated by the State, and is a law of the State within the meaning of the contract clause of the Constitution of the United States. *Mercantile Trust & Deposit Co. of Baltimore v. Collins Park & B. R. Co.*, 99 Fed. 812;

such conditions and restrictions upon the use of the public highways within their control as to them may seem necessary or reasonable. And if these authorities keep within the limits of their statutory powers, the conditions imposed by them, however onerous and difficult to perform, are as binding upon those accepting the franchise thus restricted, as if they were enactments of the State legislature or of the Constitution itself.<sup>35</sup> But the legislative authority to prescribe the conditions cannot be presumed or implied, and must be expressly conferred unless the consent of the municipal authorities to the construction and operation of the road is required. Then these authorities may prescribe reasonable conditions precedent to their consent. The consent once given, they cannot afterward withdraw it or insist upon the performance of some condition then required, unless the legislative act or acts under and subject to which the railroad

Matter of Thirty-fourth St. R. Co., 102 N. Y. 343, 7 N. E. 172; Colonial City Traction Co. v. Kingston City R. Co., 153 N. Y. 540, 47 N. E. 810.

35. People, W. S. St. R. Co. v. Barnard, 110 N. Y. 548, 18 N. E. 354; Detroit v. Detroit City Ry. Co., 37 Mich. 558; St. Joseph Co. v. South Bend, etc., R. Co., 118 Ind. 68; People v. Broadway R. Co., 126 N. Y. 29, 48 Am. & Eng. R. Cas. 697, 26 N. E. 961. An ordinance authorized a railroad company to extend its tracks from its then terminus to the municipal limits, and required the track to be extended to a certain park, being a point short of the limits, by a given time, and from that point on to the limits so soon as the same could be constructed,

operated, and kept in repair without actual loss, and that the company should accept the ordinance within ten days after its approval by the mayor. The ordinance was accepted and the road was built and operated to the park. In a proceeding to compel the construction and operation of the tracks to the city limits the answer of the company showed that it could not be constructed, operated, and kept in repair without actual loss, and this fact was admitted by demurrer. It was held that the answer showed a good reason for not compelling the company to build and operate such part of the road. People v. Chicago West Div. R. Co., 118 Ill. 113, 7 N. E. 116.

company is organized expressly confer the power.<sup>36</sup> The legislature may also prohibit municipal authorities from granting a franchise or right to use the streets, avenues, parkways, or highways of the municipality for a longer

36. *Re Kings Co. El. R. Co.*, 105 N. Y. 97, 13 N. E. 18; *El. Ry. Co. v. City of Grand Rapids*, 47 N. W. 567. The special charters granted in the early history of street railroads in Pennsylvania frequently required, as a condition precedent to the right to occupy and use the street, purchase and payment for the stock of horses, omnibuses, and other property of persons or corporations owning omnibus lines occupying the streets embraced within the franchise or streets parallel thereto; and the courts have held these conditions to be valid, and have rigidly enforced them. See *Cooper v. Second & Third St. Pass. Ry. Co.*, 3 Phila. (Pa.) 262; *Moore v. Green*, etc., R. Co., id. 210, 417; *Deschamps v. Second*, etc., R. Co., id. 279; *Green*, etc., R. Co. v. *Moore*, 64 Pa. St. 79. A railroad company which is granted by the State the right to occupy the streets of a given city on the precedent condition that such city shall consent thereto, obtains, with the consent of the city, the absolute right to occupy such streets, and is not bound by a condition subsequently imposed by the city as a condition of granting its consent, a failure to comply with which would defeat its right to so occupy the streets. *Galveston & W. R. Co. v. Galveston*, 91 Tex. 17, 36 L. R. A. 44, 39 S. W. 920. The

"terms and conditions" referred to in the Ohio act, March 30, 1877, authorizing inclined plane railway companies to hold and operate railroads leading to or connected with their inclined plane, upon the same terms and conditions on which they hold and operate their inclined planes, are the terms and conditions of the Ohio act, May 1, 1852, relating to steam railroads,—the inclined plane railroads being incorporated prior to Ohio act, April 12, 1876. The former act does not extend the life of the grant, under which street railroads acquired by these incline plane railroad companies are operated, or in anywise alter the conditions thereof. *Cincinnati Inclined Plane R. Co. v. Cincinnati*, 52 Ohio St. 609, 44 N. E. 327.

The power of a city council to grant charters to street railroad corporations does not include the power to give a fixed and vested right, for a period of years, to construct and use a street railroad without compensating adjacent owners. *Taylor v. Bay City R. Co.*, 80 Mich. 77, 43 Am. & Eng. R. Cas. 335, 45 N. W. 335. If an absolute grant be made to a railroad company by the city authorities in the exercise of power conferred by the legislature of the right to build its road on certain streets, and the company accepting the grant builds a part of

period than a time stated, and in such case the granting of consent to a railroad company to operate in certain streets, without any limitation as to time, will not be a valid exercise of the power to grant consents for the time limited in the statute.<sup>37</sup> A constitutional provision which does not in ex-

the road at great expense, the legislature may not, by subsequent amendment of the city charter, make the right of the company to build the residue of the road dependent on the consent of the majority of the property-owners on the street. *Hovelman v. Kansas City R. Co.*, 79 Mo. 632, 20 Am. & Eng. R. Cas. 17. A city cannot compel a street railroad company, which, under its charter, has the right to lay its tracks through the streets of the city, to sign a contract imposing stipulations as to the manner of using streets, etc. *Frayser v. State*, 16 Lea (Tenn.), 671.

37. *Blaschko v. Wurster*, 156 N. Y. 437, 51 N. E. 303, affg. 23 App. Div. (N. Y.) 625, 48 N. Y. Supp. 1101. In the case cited section 73 of the charter of Greater New York was considered. That section is as follows: "After the approval of this act no franchise or right to use the streets, avenues, parkways, or highways of the city shall be granted by the municipal assembly to any person or corporation for a longer period than twenty-five years."

A limitation on the term of the corporate existence of a street railroad company does not preclude its capacity to take a grant to itself and assigns of the privilege of operating its road for a longer period than that of its corporate

life. The city however is not necessarily empowered to grant such an estate. *Detroit v. Detroit City R. Co.* (C. C. E. D. Mich.), 56 Fed. 857, 56 Am. & Eng. R. Cas. 337. A street railroad corporation never has a legal existence where its charter, naming commissioners to take subscriptions to the capital stock, requires the road to be commenced within three years, and completed within ten, but the commissioners delay taking stock subscriptions until nearly ten years after the expiration of the ten years allowed for the completion of the road. *Bonaparte v. Baltimore H. & L. R. Co.* (Md.), 49 Am. & Eng. R. Cas. 198, 23 Atl. 784.

The acceptance by a street railroad company, whose charter states that it is incorporated for the full term of thirty years, without any provision for renewal or extension of an act passed several years before the expiration of the thirty years, continuing the charter in force on specified conditions and with certain restrictions for fifty additional years, makes the latter act the charter of the company, and its corporate rights, powers, and privileges are thereafter to be measured by its provisions. It cannot apply to and obtain from the secretary of state before the expiration of the thirty years an independent renewal of

press terms repeal a charter or franchise previously granted and exercised, could have no application to modify or limit such charter.<sup>38</sup>

**§ 6. Authority delegated only for a public use.**—The ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, promoting traffic and commerce, facilitating exchanges, in a word that they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty. In New York State the duty of laying out and maintaining highways has, in the main, to be performed directly by the State or by local authorities, but from an early day the legislature has from time to time delegated to turnpike corporations the right and duty to maintain public roads in municipalities, and canal companies have been organized with powers of eminent domain. It would be impracticable and contrary to our usages for the State to enter upon the general business of constructing and operating railroads, and, in analogy to the delegation of the power of eminent domain to turnpike and canal companies, it wisely delegates to corporate bodies the right to construct and maintain railroads as public ways for the transportation of freight and passengers, and as incident thereto the right to take private property under the power of eminent domain on making compensation. But the power is dormant until the legislature authorizes its exer-

its charter, under Georgia act, December 20, 1893, which applies only to corporations whose charters have expired or are about to expire. Augusta St. R. Co. v.

Augusta, 100 Ga. 701, 28 S. E. 126.

38. Louisville & N. R. Co. v. Bowling Green Ry. Co. (Ky.), 63 S. W. 4.

cise, and the particular corporation which claims the right to exercise the power must be able to show the legislative warrant, and that being shown, it must be able further to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes, or that the business which it is organized to carry on is public, and that the taking of private property for the purposes of the corporation is a taking for public use. The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated are questions appertaining to the political and legislative branches of the government, while on the other hand the question whether the uses are in fact public, so as to justify the taking *in invitum* of private property therefor, is a judicial question to be determined by the courts.<sup>39</sup> The contemplated possible limited use of a few, and not then as a right, but by way of permission or favor, is not a public use.<sup>40</sup> A railroad corporation organized for a public use cannot permit its franchise to be used as a mere cover for a private enterprise, even though it continue also to use the road as a street surface railroad for the carriage of passengers for hire.<sup>41</sup> In New York the power and the duty to hear and

39. Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 375, 383, 385, 15 N. E. 429; Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277.

40. Matter of S. R. C. R. Co., 128 N. Y. 408, 28 N. E. 506.

41. Fanning v. Osborn, 102 N.

Y. 441, 7 N. E. 307. In State v. Trenton, 36 N. J. L. 79, the court, per VAN SYCKEL, J., said: "Streets and highways are intended for the common and equal use of all citizens, to which end they must be regulated. An appropriation of them to private, in-

decide the question of public convenience and necessity, at the very beginning of the corporate life of a railroad corporation is conferred upon the state board of railroad commissioners.<sup>42</sup>

**§ 7. The delegated authority cannot be implied.**— When a railroad company relies upon a legislative act as a justification for an encroachment upon public or private rights, it must show that the statute authorized the encroachment in express terms or by clear and unquestionable implication.<sup>43</sup>

dividual uses, from which the public derive no convenience, benefit, or accommodation, is not a regulation, but a perversion of them from their lawful purposes, and cannot be regarded as an execution of the trust imposed in the city authorities." In Chicago Dock, etc., Co. v. Garrity, 115 Ill. 155, 3 N. E. 448, it was held that railway tracks leading to private warehouses might be a public use in such a sense as to justify their being laid on the city streets. Mikesell v. Durkee, 34 Kan. 509, 9 Pac. 278; Glaessner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. 707; Heath v. Des Moines, etc., Ry. Co., 61 Iowa, 11, 15 N. W. 573; Macon v. Harris, 75 Ga. 761; State v. Trenton, 36 N. J. L. 79. A street railroad company has no power to make a contract leasing space inside and outside its cars for advertising purposes. Pittsburg & B. Traction Co. v. Seidell, 6 Pa. Dist. (C. P.) 414, 27 Pittsb. L. J. (N. S.) 441, 19 Pa. Co. Ct. 463. In a recent case the New York Court of Appeals said: "But a statute is not to be condemned

on the ground that it originated in private interests and was intended in some degree to subserve private purposes. If every act originating in such motives should be declared void it is to be feared that there are too many statutes that would not stand such a searching test. So long as the use intended is not restricted to private parties or private interests, but is open to the whole public, it is no valid objection to the act that it will benefit one person, or some class of persons, more than others. The question as to whether in any given case the use is public or private is judicial, and must be determined in the end by the courts. Matter of Burns, 155 N. Y. 23, 49 N. E. 246. And see Clarke v. Blackmar, 47 N. Y. 150.

42. N. Y. Gen. Laws, chap. 39, art. II, § 59 (chap. 565 of 1890), 3 Heydecker's Gen. Laws of N. Y. (2d ed.) 3287; People ex rel. Steward v. Railroad Comrs., 160 N. Y. 202, 211.

43. Delaware, L. & W. R. Co. v. City of Buffalo, 158 N. Y. 266, 272, 53 N. E. 44; People, Bacon

From the authority given to municipalities to lay out, open, alter, repair, and amend and regulate streets, lanes, alleys, and highways, and direct the draining, pitching, and paving of them, and to do everything to facilitate public travel thereon, the right to convert a street or a part of a street into a new piece of machinery for transporting persons, with which the existence of a street has no natural or necessary connection, cannot be implied.<sup>44</sup> There is good authority

v. N. C. Ry. Co., 164 N. Y. 289, 298.

44. Davis v. The Mayor, 14 N. Y. 506, 517. In the case cited the court, per DENIO, C. J., said: "It has been laid down in the case in Kentucky (Lexington & Ohio R. Co. v. Applegate, 8 Dana [Ky.], 289) and in Williams v. The New York Central R. Co., 18 Barb. (N. Y.) 222; revd., 16 N. Y. 97, it may be said to have been decided by the Supreme Court of this State, that the laying a railroad in a street or highway is only a new and improved method of making use of the public easement over lands dedicated or appropriated, pursuant to law, for a street or highway. This doctrine has been predicated by what is truly said to be the plastic and accommodating nature of the common law. That system of jurisprudence is, no doubt, a code of principles, as distinguished from one of positive and arbitrary prescriptions, and where a doctrine of common law can, without violence, be applied to a state of things brought into existence by the change of times or the progress of civilization, it may often be properly applied, though the

facts are circumstantially different from those which existed when the rule was originally established. But the difference between a highway in the country, or a street in a city or village, and the modern contrivance of transporting persons by railroad cars running upon a grooved iron track, is, in my judgment, radical in its nature, and is not capable of being subjected to the same legal rules. The legislature appears to have taken the same view of the subject which I entertain, for whenever it has been considered necessary or proper to allow a highway or street to be used to any extent for the purpose of a railroad, the right has been conferred in express terms. (Pages 518, 519.)"

Covington St. Ry. Co. v. Covington, 9 Bush (Ky.), 127; Attorney-General v. Lombard, etc., Ry. Co., 10 Phila. (Pa.) 352; Coleman v. Second Ave. R. Co., 38 N. Y. 201. The New Jersey Subways Act (Pamph. L. 78), the object expressed in the title of which is "the placing of electrical conductors underground," does not, nor was it under such title competent for the legislature to, em-

however for the proposition that the ordinary powers of municipal corporations are ample enough, in the absence of express or other legislation on the subject indicating a different intent, to authorize them to permit or refuse to permit the use of streets within their limits for horse railroads.<sup>45</sup> But an act conferring power on a city council to make ordinances concerning nuisances, lighting and regulation of streets, the regulation of rights of way, street cars,

power the board of subway commissioners to grant a franchise to erect poles and wires in streets. The office and effect of that legislation relate to the control and regulation of such franchises derived from other competent authority. *Trustees, etc. v. Board of Subway Comrs.*, 4 Am. Electl. Cas. 135, 55 N. J. L. 436. A provision in a charter of a street railway company authorizing it, in addition to laying its roads on streets designated therein, to build extensions from any of its lines on any other streets to which the municipal authorities may consent, does not authorize it to deviate from the charter route. *Citizens' St. Ry. Co. v. Africa*, 100 Tenn. 26, 42 S. W. 485.

45. 2 Dill. Mun. Corp. (4th ed.), § 724 (575); *State v. Corrigan St. R. Co.*, 85 Mo. 275, 29 Am. & Eng. R. Cas. 596, 55 Am. Rep. 366; *Atchison St. R. Co. v. Missouri Pac. R. Co.*, 31 Kan. 660, 668, 3 Pac. 284, 14 Am. & Eng. R. Cas. 444; *State v. Mayor, etc., of Hoboken*, 30 N. J. L. 225; *Texas, etc., R. Co. v. Rosedale St. R. Co.*, 64 Tex. 80, 22 Am. & Eng. R. Cas. 160, 53 Am. Rep. 739; *Mayor, etc. v. Houston City St. R. Co. (Tex.)*,

50 Am. & Eng. R. Cas. 280; *Brown v. Du Plessis*, 14 La. Ann. 854.

An ordinance granting to a street railroad company the right to construct and operate a street railway, using either horse or steam power, was held void as being beyond the power of the municipality. *Stange v. Hill, etc., R. Co.*, 54 Iowa, 669, 7 N. W. 115. In *Eichels v. Evansville St. R. Co.*, 78 Ind. 263, 50 Am. & Eng. R. Cas. 274, 41 Am. Rep. 562, the court, per ELLIOTT, C. J., said: "There is no provision in the original charter nor in any of the various acts amending it conferring power to grant to either steam or horse railway companies, the right to use the streets of the city. The ordinary and constitutional powers of a municipal corporation are not broad enough to include the power to grant to a railway company the right to lay tracks and conduct the business of transporting passengers upon and over the streets of the municipality. Such a power is an extraordinary one, and one which cannot be implied from the charter of a municipal corporation, which confers only the usual powers ordinarily bestowed upon such corporations."

street railways, and all other railroads, and granting power to impose certain fines for the violation of the ordinance made thereunder, is intended to provide police regulations, and does not give the city council authority to grant a franchise to a railway company to construct its track on streets of the city; and an ordinance thereunder granting such privilege is void.<sup>46</sup> And it may be said generally that unless a power is necessarily incident to the general powers expressly conferred by the charter it is withheld.<sup>47</sup> An authority vested by law in a city council to make a grant cannot be delegated by it to an officer or a board of officers having no legislative powers.<sup>48</sup> The authority given to the city

46. Louisville N. R. Co. v. Mobile, etc., R. Co., 25 So. 895.

Certain Kansas statutes empowered city councils to open and improve the streets, avenues, and alleys, prevent encroachments, remove obstructions, regulate the planting and protection of shade trees, building of doorways, awnings, hitching-posts, and railroads, and all other structures projecting on, and over, and adjoining; and all other excavations through and under the sidewalks or along any street of the city, and to enact, originate, modify, or repeal any or all ordinances repugnant to the Constitution and laws of the State, and such as it should deem expedient for the good government of the city, preservation of business and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules, and regulations as might be necessary to carry such

power into effect. A street railroad was constructed under a city ordinance passed under this general authority, and the question of the power of the council to make the ordinance authorizing the construction of the road was raised. The court said: "Under the general control over the streets and alleys given to cities of the second class by chapter 19 (Comp. Laws, 1879) the city council had the power to grant to a street railway company permission to construct and operate a street railway on the streets of the city, and a track constructed by virtue of such permission was lawfully occupying the street." Atchison St. Ry. Co. v. Missouri Pac. St. Ry. Co., 31 Kan. 660, 3 Pac. 284.

47. State v. Corrigan, etc., Co., 85 Mo. 263; Forman v. New Orleans, etc., Ry. Co., 40 La. Ann. 446, 4 So. 246; Birmingham, etc., Ry. Co. v. Birmingham St. Ry. Co., 79 Ala. 465, 470.

48. Potter v. Collis, 156 N. Y.

council cannot be extended to authorize a grant to an individual of a right to construct a private railroad across or along a street for his own particular benefit;<sup>49</sup> nor to give franchises to so many companies that the street will be virtually closed to public travel except upon the railroads.<sup>50</sup> A railroad corporation is particularly called upon to consult the public convenience, and what is done by it in that direction should be sustained, if support for the act is possible to be found in the law of its being. If a reasonable necessity exists in a proper discharge of its duties to the public, for the act complained of, that should be a sufficient answer to the complaint. What a corporation may, or may not, do within its grant of powers, is to be determined by the reasonable intemds of its charter, as well as by its clear expressions of authority. In a doubtful case of an exercise of power search should be made for what may be reasonably implied as a means of carrying out the powers specifically given so as to permit of the amplest exercise thereof which

16, 50 N. E. 413; State, Henderson v. Bell, 34 Ohio St. 194; Citizens' St. Ry. Co. v. Jones (Ark.), 34 Fed. 579. Under a provision in a street railroad company's charter to the effect that the railroad should be laid out by the mayor and the aldermen of the city "in like manner as highways are laid out," the mayor and aldermen must direct the manner and place of laying the track and cannot delegate their power so to do; and therefore where they lay out a single track, but without turnouts, their direction that "said horse railroad company may construct such suitable turn-

outs on either side of said center line as they may find necessary," will not validate the location and construction of turnouts by the railroad company. Concord v. Concord H. R. Co., 65 N. H. 30, 18 Atl. 87.

49. Heath v. Des Moines, etc., R. Co., 61 Iowa, 11, 15 N. W. 573, 10 Am. & Eng. R. Cas. 313; Memphis City R. Co. v. Memphis, 4 Coldw. (Tenn.) 406; Carli v. Stillwater St. R., etc., Co., 28 Minn. 373, 10 N. W. 205, 3 Am. & Eng. R. Cas. 226, 41 Am. Rep. 290.

50. Street R. Co. v. West Side St. R. Co., 48 Mich. 433, 12 N. W. 643, 7 Am. & Eng. R. Cas. 95.

is consistent with the object and purpose of the public grant.<sup>51</sup>

**§ 8. Curative acts, validating exercise of authority.**—The power of the legislature over all municipal corporations is unlimited, save by the restrictions of the State and Federal Constitutions.<sup>52</sup> There is nothing in the Constitution of the United States which prohibits the legislature of a State from passing any act which divests rights vested by law, pro-

51. *Brooklyn Ry. Co. v. Brooklyn*, 152 N. Y. 244-250, 46 N. E. 509. In the case cited a judgment had been rendered restraining the defendant from interfering with the plaintiff in the construction of tracks to connect its car storehouse on a city street not named in its articles of association with its railroad. A majority of the abutting owners had consented and the storehouse was located upon the only vacant land available. The franchise of the railroad, after describing the route of the railroad to be from the intersection of Court and Montague streets, in the city of Brooklyn, through Montague street to a terminus at Wall street ferry, gave "authority to construct and maintain in said street and in such parts of those adjacent thereto as may be necessary, all necessary connections, switches, sidings, turnouts, turntables, and suitable stations for the convenient operation of said road and the housing and care of its cars and other equipments, and the connecting said road with its power station. It further provided that no cars should be housed or stored on the

main line of Montague street, or any of the adjacent streets, at any place east of the top of the hill leading to Wall street ferry. The plaintiff completed its road and entered upon its operation, but it had no adequate, nor suitable, place for housing its cars. For the purpose of a power station and of a storehouse for its cars it bought a plot of land on a street lying some 1,270 feet south of Montague street, and in order to haul its cars from the terminus of its road, at Wall street ferry to the storehouse, it contracted with the Brooklyn City Railroad Company for the use of its tracks upon a street which runs along the river and intersects Montague and State streets, and also obtained the consents of more than a majority in value of the property-owners along the proposed route of connection with the storehouse. Thereupon the city interfered and endeavored to prevent the plaintiff from making the necessary connection and the action was brought to restrain the interference and was upheld."

52. *Williams v. Egelston*, 170 U. S. 304-312, 42 L. Ed. 1047.

vided its effect be not to impair the obligation of a contract.<sup>53</sup> The only limitation upon the power of the legislature of a State to pass retrospective laws is that the Constitution of the United States forbids passage of *ex post facto* laws which are retroactive penal laws. But a law merely divesting antecedent vested rights of property, where there is no contract, is not inconsistent with the Federal Constitution.<sup>54</sup> Where the legislature had the power to authorize the act, it can, by retrospective legislation, cure the evils arising from the irregular execution of such power.<sup>55</sup> The general and established rule in relation to curative statutes seems to be that if the thing omitted, which constitutes the defect sought to be removed, is something which the legislature might have dispensed with by a previous statute, it may do so by a subsequent one. If the irregularity consists in doing some act, or doing it in a mode which the legislature might have made immaterial by a prior statute, it may do so by a later one. It may thus ratify a contract of a municipal corporation for a public purpose and establish municipal ordinances and proceedings irregularly adopted or instituted.<sup>56</sup>

53. *Randall v. Krieger*, 90 U. S. (23 Wall.) 137-150, 23 L. Ed. 124.

54. So held where the legislature of Maryland set aside a condemnation proceeding and a judgment condemning the property and awarding damages, and directed a new assessment. *Baltimore & Susquehanna R. Co. v. Nesbet*, 10 How. (U. S.) 395, 13 L. Ed. 459.

55. *People v. Mitchell*, 35 N. Y. 551; *Williams v. Duaneburgh*, 66 id. 129, 137; *Kittinger v. Buffalo Traction Co.*, 160 id. 377, 384, 54 N. E. 1081; *McCartney v. Bank, etc., R. Co.*, 112 Ill. 611, 29 Am.

& Eng. R. Cas. 326; *People v. Los Angeles El. R. Co.*, 91 Cal. 338, 27 Pac. 673; *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787. In the case last cited the common council of St. Paul, by ordinance, granted a franchise for the construction of a street railway, which was in excess of its authority; subsequently the ordinance was made valid by the legislature, and it was held that thereafter the common council could not rescind or revoke the right so granted.

56. *Hatzung v. Syracuse*, 92 Hun (N. Y.), 203, 208; *Duaneburgh v. Jenkins*, 57 N. Y. 177.

In the absence of any constitutional restrictions it may, by retrospective statutes, legalize the unauthorized acts and proceedings of subordinate local agencies where it might have previously authorized such acts and proceedings.<sup>57</sup> In short, it is competent for the legislature by curative laws, when not restrained by constitutional provisions, to make a void thing valid.<sup>58</sup> While all defects in the process of organization and formation of a railroad corporation may be cured

57. *Bolles v. Brimfield*, 120 U. S. 759-765, 30 L. Ed. 789; *Jonesboro v. Cairo, etc., R. Co.*, 110 U. S. 192-200, 28 L. Ed. 116; *Attorney-General v. Chicago & Evanstown Ry. Co.*, 112 Ill. 611; *People v. Los Angeles El. Ry. Co.*, 91 Cal. 338, 27 Pac. 673. An ordinance granting a franchise for the construction of a street railroad was adopted by the common council of St. Paul and subsequently by the legislature of Minnesota "confirmed and validated." *Held*, that thereafter the common council could not rescind or revoke the right so granted. *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787. Certain grants or contracts under which inclined plane companies held a street railway at the time of its passage were validated by Ohio act, March 30, 1877, granting to such companies the power to hold, lease, or purchase and maintain and operate street railroads. *Louisville Trust Co. v. Cincinnati* (C. C. App. 6th), 22 C. C. A. 234, 47 U. S. App. 36, 76 Fed. 296.

58. *Walpole v. Elliott*, 18 Ind. 258; *Morris v. State*, 62 Tex. 728; *Mason v. Spencer*, 35 Kan. 512,

11 Pac. 402; *Walter v. Town of Union*, 53 N. J. L. 350. A municipal ordinance granted to a street railroad company the right to construct and operate the road, using either horse or steam power; it was held void as being beyond the power of the municipality which could not authorize the use of the street by a steam railroad without compensation to the owners of abutting property. *Stange v. Hill, etc., R. Co.*, 54 Iowa, 669, 7 N. W. 115; *Stanley v. Davenport*, 54 Iowa, 463, 2 N. W. 1064, 6 id. 706, 37 Am. Rep. 216. An act validating the ordinance by granting power to pass it was held void by reason of the constitutional provision against special legislation. *Stange v. Dubuque*, 62 Iowa, 303, 17 N. W. 518, 14 Am. & Eng. R. Cas. 107. In Ohio a validating act was held ineffectual because its operation enabled the municipal officers to evade the general statutory provision requiring the franchise to be granted to the highest bidder. *Knorr v. Miller*, 5 Ohio C. C. 609, 623; *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621.

by legislative recognition,<sup>59</sup> it cannot thus create a corporation where one *de facto* did not exist.<sup>60</sup>

**§ 9. Charter, a contract; how construed.**—The whole doctrine of vested rights as applied to the charters of corporations is based upon Dartmouth College v. Woodward,<sup>61</sup> in which the broad proposition was laid down that such charters were contracts within the meaning of the Constitution, and hence that an act of the State legislature altering a charter in any material respect was unconstitutional and void. The doctrine of this case has been subjected to more or less criticism by the courts and the provision has been reaffirmed and applied so often as to become firmly established as a canon of American jurisprudence.<sup>62</sup> Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation.<sup>63</sup> So, a statute repealing the charter of a street railroad company and transferring its franchise and track to another impairs the obligation of the contract of the charter, unless there is reserved to the legislature the right to repeal the statute under which the company was

59. Caugh v. North Ave. R. Co. (Md.), 33 Atl. 463; McAuley v. Columbus, etc., R. Co., 83 Ill. 348; McCartney v. Chicago, etc., R. Co., 112 id. 611, 29 Am. & Eng. R. Cas. 326; Black River, etc., R. Co. v. Barnard, 31 Barb. (N. Y.) 258; Baltimore, etc., R. Co. v. Marshall Co., 3 W. Va. 319; Cowell v. Colorado Springs Co., 100 U. S. (10 Otto) 55-61, 25 L. Ed. 547, 3 Colo. 82; Mead v. N. Y., etc., R. Co., 45 Conn. 199; Illinois, etc.,

R. Co. v. Cook, 29 Ill. 237; Atlantic, etc., R. Co. v. St. Louis, 3 Mo. App. 315; affd., 66 Mo. 228.

60. Attorney-General v. Chicago, etc., R. Co., 35 Wis. 602.

61. 17 U. S. (4 Wheat.) 518, 4 L. Ed. 629.

62. Pearsall v. Great Northern R. Co., 161 U. S. 646, 660, 40 L. Ed. 838, 843.

63. Pearsall v. Great Northern R. Co., 161 U. S. 646, 661, 40 L. Ed. 838, 843.

organized.<sup>64</sup> The United States Supreme Court has had perhaps more frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation than in any other, and in a long series of decisions has held that the clause imposing certain taxes in lieu of all other taxes, or of all taxes to which the company or stockholders therein would be subject, is impaired by legislation raising the rate of taxation, or imposing taxes other than those specified in the charter.<sup>65</sup> Within the same principle are grants of an exclusive right to supply gas or water to a municipality, or to occupy its streets for railway purposes.<sup>66</sup> So, if a company be chartered with power to construct and maintain a turnpike, erect tollgates, and collect tolls, such franchise is protected by the Constitution.<sup>67</sup> In these cases however the title to property had either become vested in the grantee by operation of law, or the exercise of the power granted was so far necessary to the full enjoyment of the

64. *Greenwood v. Union Freight R. Co.*, 105 U. S. 646, 661, 40 L. Ed. 838, 843.

65. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 662, 40 L. Ed. 838, 843; *Piqua Branch of State Bank v. Knoop*, 57 U. S. (16 How.) 369, 14 L. Ed. 977; *New Jersey v. Wilson*, 11 U. S. (7 Cranch) 164, 3 L. Ed. 303; *Gordon v. App. Tax Court*, 44 U. S. (3 How.) 133, 11 L. Ed. 529; *Dodge v. Woolsey*, 59 U. S. (18 How.) 631, 15 L. Ed. 401; *Wilmington & W. R. Co. v. Reid*, 80 U. S. (13 Wall.) 264, 20 L. Ed. 568; *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 26 L. Ed. 1128.

66. *Pearsall v. Great Northern*

R. Co.

161 U. S. 646, 663, 40 L. Ed. 838, 844; *New Orleans Gas Light Co. v. Louisiana, etc., Mfg. Co.*, 115 U. S. 650, 29 L. Ed. 517; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Light Co.*, 115 U. S. 683, 29 L. Ed. 510; *St. Tammany Water Works Co. v. New Orleans Water Works Co.*, 120 U. S. 64, 30 L. Ed. 564; *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray (Mass.), 1.

67. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 663, 40 L. Ed. 838, 844; *St. Clair County Turnp. Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 465.

main object of the charter that persons subscribing to the stock might be presumed to take into consideration, and be influenced in their subscription, by the fact that the corporation was endowed with those privileges during the continuation of the charter.<sup>68</sup> Such limitations however upon the power of the legislature must be construed in subservience to the general rule that grants by the State are to be construed strictly against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language.<sup>69</sup> Hence an exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed.<sup>70</sup> Nor does it follow, from the fact that the contract evidenced by the charter cannot be impaired, that the power of the legislature over such charter is wholly taken away, since statutes which operate only to regulate the manner in which the franchises are to be exercised, and which do not interfere substantially with the enjoyment of the main object of the grant, are not open to the objection of impairing the contract. A familiar instance of this class of legislation is that enacted under what is known as the police power. In virtue of this the statute may prescribe regulations contrib-

68. Pearsall v. Great Northern R. Co., 161 U. S. 646, 664, 40 L. Ed. 838, 844.

69. Pearsall v. Great Northern R. Co., 161 U. S. 646, 664, 40 L. Ed. 838, 844; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036.

70. Pearsall v. Great Northern R. Co., 161 U. S. 646, 664, 40 L.

Ed. 838, 844; Charles River Bridge Proprs. v. Warren Bridge Proprs., 36 U. S. (11 Pet.) 420, 9 L. Ed. 773; Wash. & B. Turnp. Co. v. Maryland, 70 U. S. (3 Wall.) 210, 18 L. Ed. 180; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. Ed. 267; Detroit Citizens' R. Co. v. Detroit Ry. Co., 171 U. S. 48, 43 L. Ed. 67.

uting to the comfort, safety, and health of passengers, the protection of the public at highway crossings or elsewhere, the security of owners of adjacent property by requiring the track to be fenced, and such appliances to be annexed to the engines as shall prevent the communication of fire to neighboring buildings.<sup>71</sup> The contract protected by this clause must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license.<sup>72</sup> So a bare, unexecuted power to consolidate with other corporations, a power which, if it exists, would authorize a railroad corporation to absorb, by successful and gradual accretions, the entire railway system of the country, is, so long as it remains unexecuted, within the control of, and subject to revocation by the legislature, at least so far as it applies to parallel or competing lines.<sup>73</sup> Where the charter authorizes the company in sweeping terms to do certain things which are necessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexe-

71. Pearsall v. Great Northern R. Co., 161 U. S. 646, 665, 40 L. Ed. 838, 845; Butchers' Benev. Assn. v. Crescent City L. S. L. & S. H. Co. (Slaughter-House Cases), 83 U. S. (16 Wall.) 36, 21 L. Ed. 394; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Paterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1116; Barbier v. Conolly, 113 U. S. 27, 28 L. Ed. 923; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. Ed. 1052; Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385; Eagle Ins. Co. v. Ohio, 153 U. S. 446, 38 L. Ed.

779; Atchison, etc., R. Co. v. Matthews, 174 U. S. 96, 43 L. Ed. 909.

72. Pearsall v. Great Northern R. Co., 161 U. S. 646, 667, 40 L. Ed. 838, 845; Christ Church v. Philadelphia Co., 65 U. S. (24 How.) 300, 16 L. Ed. 602; St. Clair Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. Ed. 651; Philadelphia & G. F. Pass. R. Co.'s App., 102 Pa. St. 123.

73. Pearsall v. Great Northern R. Co., 161 U. S. 646, 672, 40 L. Ed. 838, 847.

cuted, is within the control of the legislature and may be treated as a license, and may be revoked if a possible exercise of such power is found to conflict with the interests of the public.<sup>74</sup> Statutes conveying franchises and special privileges belonging to the public should be construed most favorably to the people; and all reasonable doubts in construction should be solved against the person claiming under the grant; and words or phrases which are ambiguous or admit of different meanings are to receive a construction most favorable to the public.<sup>75</sup> Such a rule of construction

74. Pearsall v. Great Northern R. Co., 161 U. S. 646, 674, 40 L. Ed. 838, 847. An obligation to maintain a street railroad is not imposed by the grant of a mere privilege to construct and maintain it. San Antonio St. Ry. Co. v. State, Elmendorf, 90 Tex. 520, 35 L. R. A. 662, 6 Am. & Eng. R. Cas. (N. S.) 658, 39 S. W. 926.

Where the charter of a street railroad company provides that it may lay tracks along such streets as the municipal corporation shall authorize, such authority, when given, constitutes a contract which cannot be rescinded by a subsequent act of such municipal corporation. People v. Chicago West Div. R. Co., 18 Ill. App. 125.

75. Trustees of East Hampton v. Vail, 151 N. Y. 463, 472, 45 N. E. 1030; People v. B. R. R. Co., 126 N. Y. 29, 37, 26 N. E. 961; Barrett v. Stockton & D. R. Co., 2 M. & G. 134; Stourbridge Canal Co. v. Wheeley, 2 B. & Ad. 792; People v. N. Y. & S. I. & F. Co., 68 N. Y. 71; McFarlan v. Orange, etc., Car Co., 37 N. J. Eq. 17; West End & Atlantic St.

R. Co. v. Atlantic St. R. Co., 49 Ga. 151; Rice v. Railroad Co., 1 Black (U. S.), 358; New Orleans & C. R. Co. v. New Orleans, 34 La. Ann. 429. The New York statute (Laws of 1889, chap. 531, § 12), authorizing street surface railroads, upon obtaining the approval of the State board of railroad commissioners and the consent of the property-owners as specified, to operate its road "by any power other than locomotive steam power instead of by animal or horse power," confers no substantial franchise to conduct or operate a road, but is simply a regulating act. Matter of T. A. R. Co., 121 N. Y. 536, 24 N. E. 951; Colonial City T. Co. v. Kingston R. Co., 154 N. Y. 493, 48 N. E. 900. The manner in which an existing franchise to operate a railroad may be exercised is matter of regulation, and is generally within the absolute control of the legislature. Matter of T. A. R. R. Co., 121 N. Y. 536, 540, 24 N. E. 951. Where a special statute charter (N. Y. Laws 1871, chap. 517) authorized a street surface rail-

manifestly is the proper one always to be followed where the property of the citizen is sought to be taken against his consent. Everything not enumerated in a grant, or excepted out of it, is held to be as distinctly negatived as though there were express words of negation.<sup>76</sup> The powers of the corporation must be deemed to extend however to the accomplishment of legitimate corporate ends, and to whatever may be found to be within the scope of the legislative grant. The purpose, in creating a railroad corporation, must be deemed to be of a public nature, and the public is interested in its full and free accomplishment. If the proposed corporate act is in furtherance of the public convenience, and can fairly find a sanction in the charter, it should be upheld. Indi-

road company to construct and maintain through the streets of the municipality and operate a street railroad "by horses, mules, or dummy engines," a subsequent general statute prohibiting the use of locomotive steam power modifies the special charter. *People, Babylon R. Co. v. Commissioners*, 32 App. Div. (N. Y.) 179. In the case last cited a "kinetic" motor was held not to be the "locomotive steam power" contemplated by the statute.

The provisions of the Pennsylvania Street Railway Act of 1889 are applicable to a street railway company incorporated under special act of the assembly, which accepts the same as therein provided under the clause, "any street passenger railway company heretofore existing under color of any charter," though the words "under color of" are inaptly chosen as the equivalent of "under authority of."

*Berks Co. v. Reading City Pass. Ry. Co.*, 126 Pa. St. 102; *People, Third Ave. Ry. Co. v. Newton*, 112 N. Y. 396, 19 N. E. 831; *Citizens' St. Ry. Co. v. Jones* (Ark.), 34 Fed. 579.

76. *Farrell v. Winchester Ave. R. Co.*, 3 Am. Electl. Cas. 85, 6 Conn. 127; *Durousseau v. United States*, 10 U. S. (6 Cranch) 307, 3 L. Ed. 232. "In so far as the rights granted to corporations are destructive of or encroach upon public or common rights, they are undoubtedly to be construed most strongly against those setting them up and in favor of the State or the public; they are not to be extended beyond the express words in which they are given, or their clear import, and what is not given in unequivocal terms is to be deemed as expressly withheld." *Endlich on Interpretation of Statutes*, § 354.

vidual interests must be subservient so far to the public as to give way before an evident public requirement.<sup>77</sup> Where the grant contains no words of definition or limitation the corporation takes by implication all, and only, such powers as are reasonable and necessary to its legitimate purposes.<sup>78</sup>

77. Matter of U. E. R. Co. of Brooklyn, 113 N. Y. 275, 21 N. E. 81; Suburban Rapid Transit Co. v. Mayor, 128 N. Y. 510, 28 N. E. 525. Mere legislative power to say how the streets of a city shall be used, conferred by a charter upon the common council, cannot be construed as giving power to contract with a street railway company for the right to lay tracks in the streets for a term of years, although without such contracting power no street railroad will be built. Detroit v. Detroit City Ry. Co., 56 Fed. 857. But where the charter of a railroad company empowers the directors to make such agreements with any person or corporation whatsoever "as the construction of their railroad, or its maintenance, and the convenience and interest of the company and the conduct of its affairs may, in their judgment, require; also to build and run steamboats," etc., a contract with a steamboat company by which the railroad corporation guarantees a certain amount of receipts from a line of boats to run in connection with the road, is not *ultra vires*. Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 98, 27 L. Ed. 413.

78. City of St. Louis v. Missouri R. Co., 13 Mo. App. 524; Attorney-General v. Chicago, etc., R. Co., 112 Ill. 611. A company author-

ized by its charter to operate a road commencing in one municipality and extending into another, may operate a line entirely within the limits of the one municipality. Wilmington City Ry. Co. v. People's Ry. Co. (Del. Ch.), 47 Atl. 245; West Penn. Co.'s Appeal, 99 Pa. St. 155; Mason v. Brooklyn City, etc., R. Co., 35 Barb. (N. Y.) 373; McFarlan v. Orange, etc., R. Co., 13 N. J. Eq. 17. Reference to streets by name with a general reference to the corporate limits is sufficient in a street railway charter under a statute providing that the charter shall state the initial and final termini and general route of the road. Africa v. Knoxville (C. C. E. D. Tenn.), 70 Fed. 729. The organization of a street railroad company under the Pennsylvania act of 1889 is not limited to one city, borough, or local jurisdiction in the absence of anything indicating a restriction as to locality, and the term "streets," as used therein, includes roads in townships as distinct from the streets of a borough or city. Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co., 3 Pa. Dist. (C. P.) 58, 14 Pa. Co. Ct. 88. A charter empowering a street railroad company to construct its railroad "upon and over" certain streets "except in" certain other streets mentioned, is not to be construed as preventing

**§ 10. Amendment or repeal of charter.**— Each State by its Constitution, a general law, or in a special act granting the charter has reserved power to alter, amend, or repeal the same, and such reservation is valid.<sup>79</sup> And where there is no such reservation, if the charter be altered or modified with the assent of the corporation, the obligation of the contract created by the original charter is not impaired.<sup>80</sup> Provision in a charter that it should not be altered or alterable in any other manner than by act of the legislature is in all respects equivalent to an express reservation to the State to make any alterations in the charter which the legislature, in its wisdom, may deem fit, just, and expedient to enact.<sup>81</sup> If the power be reserved the legislature may repeal, alter, or modify the charter by general statute, or it may be done by change in the Constitution; a creditor cannot object, nor is the consent of the corporation necessary, nor would a stockholder be thereby discharged from his obligation to the cor-

the company from laying tracks "across" one of the excepted streets, especially where the company has previously laid a track across one of such excepted streets without hindrance. *State v. Newport St. R. Co.*, 16 R. I. 533, 18 Atl. 161, 6 R. & Corp. L. J. 378. A grant by the legislature to a street railroad company of the right to construct and operate a railroad along a street which is already occupied by another company will not of itself give the new company the right to use the old tracks. *Louisville City R. Co. v. Central Pass. R. Co.*, 87 Ky. 223, 8 S. W. 329.

*79. McLaren v. Pennington*, 1 *Paige* (N. Y.) 102; *Crease v. Bab-*

*cock*, 40 Mass. 334; *English v. N. H. & N. Co.*, 32 Conn. 243; *Commonwealth v. Fayette Co. R. Co.*, 55 Pa. St. 452.

*80. Pennsylvania College Cases*, 80 U. S. (13 Wall.) 190, 20 L. Ed. 550; *Mumma v. Potomac Co.*, 33 U. S. (8 Pet.) 281, 8 L. Ed. 945; *Slee v. Bloom*, 19 Johns. (N. Y.) 456; *Riddle v. Locks & Can.*, 7 Mass. 185; *Lincoln & Ken. B. K. v. Richardson*, 1 Me. 79; *Sprague v. Illinois R. Co.*, 19 Ill. 174.

*81. Pennsylvania College Cases*, 80 U. S. (13 Wall.) 190, 20 L. Ed. 550; *Houston v. Jefferson Coll.*, 63 Pa. St. 428; *State v. Yard*, 10 Chicago L. N. 90; *Commonwealth v. Dousall*, 3 Whart. (Pa.) 559.

poration.<sup>82</sup> But under this power to alter the State cannot change the nature of the corporation, nor take away property rights, nor authorize the taking of private property for public use without compensation.<sup>83</sup> Nor under the power to repeal can the State destroy the executory contracts of corporations.<sup>84</sup> But it may regulate passenger and freight rates thereafter made.<sup>85</sup> It cannot however establish a tariff

82. Schenectady, etc., P. R. Co. v. Thatcher, 11 N. Y. 102; Matter of Lee's Bank, 21 id. 9; Reed v. Frankfort Bank, 23 Me. 318; Attorney-General v. Railroad Co., 35 Wis. 425; Mayor v. N., etc., R. Co., 109 Mass. 103; Paring v. Oliver, 1 Minn. 302; Butler v. Walker, 80 Ill. 345; State v. Commissioners, 38 N. J. 472.

83. Commonwealth v. Essex County, 79 Mass. 239; Buffalo, etc., R. Co. v. Dudley, 14 N. Y. 336; Allen v. McKean, 1 Sumn. (U. S.) 276; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692. In the case last cited the court, per RUGER, Ch. J., said: "The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might

have been the intention of the legislature or even of the framers of our Constitution in respect to the effect of the power of repeal reserved in acts of incorporation, upon property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution." (Page 36.) Shields v. Ohio, 95 U. S. (5 Otto) 319, 24 L. Ed. 357. Having granted to the corporation a franchise to maintain a street surface railroad it cannot require the change into an underground road maintained in a tunnel. Coney Isl., F. H. & B. R. Co. v. Kennedy, 15 App. Div. (N. Y.) 588, 44 N. Y. Supp. (78 St. Rep.) 825.

84. Curran v. Arkansas, 56 U. S. (15 How.) 304, 14 L. Ed. 705, 12 Ark. 321.

85. Parker v. Metropolitan R. Co., 109 Mass. 506; Shields v. State, 26 Ohio St. 86; Attorney-General v. Railroad Co., 35 Wis. 425; Peik v. Chicago, etc., R. Co., 94 U. S. (4 Otto) 164, 24 L. Ed. 97, 6 Biss. (U. S.) 177; Shields v. Ohio, 95 U. S. (5 Otto) 319, 24 L. Ed. 357. A railroad company takes its charter, containing a provision giving power to the directors to make rules as to rates of toll, subject to the general law of the State,

of rates which is so unreasonable as to practically destroy the value of the property of the corporation. It would thus deprive the corporation of its property without due process of law and would deny to it the equal protection of the laws.<sup>86</sup> The State's power to alter or modify a charter is not exhausted by one alteration;<sup>87</sup> and if a general statute or the Constitution reserves the power to alter charters, all charters subsequently granted are subject thereto.<sup>88</sup> If incorporation be authorized with a reserve power of revocation by the legislature, a single right or privilege may be withdrawn without revoking the whole franchise, and this may be done either directly or by necessary implication, as by the passage of an act inconsistent with some right or privilege possessed by the corporation.<sup>89</sup> Where the power to alter is reserved, the State may prescribe how the power shall be exercised.<sup>90</sup> The power may be exercised, so far as street surface railroads are concerned, by amendment to charters of municipal corporations, and such amendments will control the municipal power with reference to corporate franchises previously

and to such changes as may be made in such general law and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation. Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970.

86. Covington & L. Turnp. Co. v. Sandford, 164 U. S. 578, 592, 41 L. Ed. 560, 565; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 657, 39 L. Ed. 567, 570.

87. M. E. R. Co. v. Commissioners, 37 N. J. 228; People v.

Hills, 46 Barb. (N. Y.) 340; revd. on another point, 35 N. Y. 449; Proprs. v. Haskell, 7 Me. 474.

88. Central R. Co. v. State, 54 Ga. 501; Fort Plain Bridge v. Smith, 30 N. Y. 44; Iron City Bank v. Pittsburg, 37 Pa. St. 340; State v. Person, 32 N. J. 134; Griffing v. Kentucky Ins. Co., 3 Bush (Ky.), 592; Ruckert v. Grand Ave. Ry. Co. (Mo.), 63 S. W. 814.

89. Wilmington City Ry. Co. v. Wilmington & B. S. R. Co., 46 Atl. 12.

90. Matter of Recip. Bank, 22 N. Y. 9, 29 Barb. (N. Y.) 369, 17 How. Pr. (N. Y.) 323.

granted.<sup>91</sup> Under the power to alter, the State may authorize a street surface railroad corporation to build branches or extensions of its road without the consent of its stockholders, where the character of the contract is not altered thereby and the alteration is not prejudicial to the stockholders' interest.<sup>92</sup> It may require railroad companies to unite in a passenger station in a municipality, to extend their tracks thereto, and to discontinue parts of their existing location.<sup>93</sup> It may take away a corporate franchise or prescribe the conditions and terms upon which the corporation may live and exercise such franchise.<sup>94</sup> It should be remembered however that the power to alter franchises and grants means their restriction rather than their enlargement, and under the guise of an amendment franchises and privileges cannot be conferred upon a corporation which are not in harmony with the spirit of the original grant.<sup>95</sup> A statutory provision that "all charters heretofore granted by the secretary

91. *Eichels v. Evansville St. Ry. Co.*, 78 Ind. 261, 50 Am. & Eng. R. Cas. 274, 41 Am. Rep. 562; *Taylor v. Bay City St. Ry. Co.* (Mich.), 47 N. W. 335.

92. *Schenectady, etc., P. R. Co. v. Thatcher*, 11 N. Y. 102; *Durfee v. Old Colony, etc., R. Co.*, 5 Allen (Mass.), 230; *Bannett v. Alton, etc., R. Co.*, 13 Ill. 504; *Pacific R. Co. v. Remshaw*, 18 Mo. 210. Under certain circumstances a street railroad corporation organized under special charter may procure its charter to be amended so as to authorize it to extend the termini of its line fixed by its original charter and to acquire rights granted to other roads. *State, Crowe v. Lindell R. Co.*, 151 Mo. 162, 52 S. W. 248.

93. *Mayor v. Norwich, etc., R. Co.*, 109 Mass. 103.

94. *Mayor, etc. v. Twenty-third St. R. Co.*, 113 N. Y. 311. A franchise granted by the State, with a reservation of the right of repeal, must be regarded as a mere privilege while it is suffered to continue. *Cincinnati, etc., Ry. Co. v. The City, etc., Tel. Assn.*, 3 Am. Electl. Cas. 443, 458, 48 Ohio St. 390, 27 N. E. 890, note 460.

95. *Astor v. Arcade R. Co.*, 113 N. Y. 93, 112, 20 N. E. 594. In the case cited, the question was whether or not the corporation organized to transmit letters, packages, and merchandise in New York and Brooklyn by means of pneumatic tubes to be constructed beneath the surface could by

"of state to street and suburban railroad companies are hereby confirmed and declared to have had full effect from their dates," is in effect a general law; and companies theretofore organized after the acceptance of the provisions of the act, although only *de facto* corporations, become vested with all the corporate powers mentioned in their charters.<sup>96</sup>

**§ 11. Forfeiture or annulment of charter.**— Statutes authorizing the formation of railroad corporations usually contain provisions for a forfeiture upon certain contingencies. Whether a forfeiture clause is or is not self-executing depends wholly upon the language employed by the legislature, which must be strong and unmistakable to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the attorney-general.<sup>97</sup> When the words used in the statute to declare a penalty for the nonperformance of conditions specified are that the corporation shall forfeit its charter, or its charter rights, or be dissolved, or where equivalent expressions are used, these have never been held *ex proprio vigore*, to put an end to corporate life. By such nonperformance a corporation is not *ipso facto* dissolved or deprived of its corporate existence or corporate rights, but it is simply exposed to proceedings, on behalf of the State, to establish and enforce the forfeiture. The State which imposes the conditions may waive their performance, and the

amendment of its charter be permitted to operate a railroad for passenger and freight traffic, it was also decided that the bill was a private or local bill, embracing more than one subject, and therefore unconstitutional.

96. *Brown v. Atlanta Ry. & P. Co.* (Ga.), 39 S. E. 71.

97. *Matter of N. Y. & L. I. B. Co.*, 148 N. Y. 540, 547, 42 N. E. 1088; *People v. Los Angeles El. Ry. Co.* (Cal.), 27 Pac. 673; *Commonwealth v. Bank*, 28 Pa. St. 383.

corporate life may run on until the State, by proper proceeding, intervenes and enforces the forfeiture. Until the State does thus intervene, a private individual cannot set up the forfeiture or in any way challenge the corporate existence with its full vitality.<sup>98</sup> But if the statute provides that upon

98. Matter of B. E. R. Co., 125 N. Y. 434, 440.

Forfeiture clauses held not self-executing:

Oregon Corporation Act provided that if any corporation should neglect and cease to carry on its business for any period of six months its "corporate powers shall cease." *Held*, that such neglect and cessation did not, *ipso facto*, terminate the existence of the corporation.

*United States*.—Wallamet Falls, etc., Co. v. Kittridge, 5 Sawy. (U. S.) 44. The act of incorporation provided that whenever over four-fifths of the capital stock of the company to which the act applied should become concentrated, by purchase or otherwise, in the hands of less than five persons, etc., "all the corporate powers and privileges granted should cease and determine." *Held*, that a private party could not take advantage of the forfeiture, and that the sovereign power might waive it. Frost v. Frostburgh Coal Co., 65 U. S. (24 How.) 278, 16 L. Ed. 637.

*Illinois*.—Baker v. Backus, 32 Ill. 79.

*Maryland*.—Chesapeake Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Musgrave v. Morris, 54 Md. 161.

*New Jersey*.—New Jersey So.

R. Co. v. Long Branch Comrs., 39 N. J. L. 35.

*New York*.—Matter of Reformed Presbyterian Church, 7 How. Pr. (N. Y.) 476; People v. Manhattan Co., 9 Wend. (N. Y.) 351. In the case last cited the charter provided that "said company shall, within ten years from the passing of this act, furnish and continue a supply of pure and wholesome water, sufficient for the use of all such citizens dwelling in such city as shall agree to take it on the terms to be demanded by the said company; in default whereof the said corporation shall be dissolved." *Held*, that the words "be dissolved" should be construed to mean dissolved in a regular and legal manner by a proper judicial proceeding.

The words of forfeiture in the following case are "all rights and privileges granted hereby shall be null and void." The court held that the words "null and void," as used in the act, clearly meant voidable. New York, etc., Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088; Matter of Staten Isl. R. T. Co., 103 N. Y. 251, 8 N. E. 548; Day v. Ogdensburg, etc., R. Co., 107 N. Y. 129, 13 N. E. 765; Woodruff v. Erie R. Co., 93 N. Y. 609; Matter of Townsend, 39 id. 171; Matter of New York El. R. Co., 70 id. 338; Matter of New York,

the contingency the franchise shall be terminated or shall cease, then, in a proper case, judicial proceedings are unnecessary, the dissolution of the corporation may be declared at the suit of a private individual, and the legislature may confer the franchise upon any other company or person.<sup>99</sup>

etc., Ry. Co., 99 id. 12, 1 N. E. 27.

*Pennsylvania.*—Turnpike Co. v. Jenkintown El. R. Co., 4 Pa. Dist. 8.

*South Carolina.*—Cheraw, etc., R. Co. v. White, 14 S. C. 61; Cheraw, etc., R. Co. v. Garland, id. 64.

*Tennessee.*—La Grange, etc., R. Co. v. Raney, 7 Coldw. (Tenn.) 420.

*Vermont.*—Vermont, etc., R. Co. v. Vermont C. R. Co., 34 Vt. 1.

99. Matter of B. W. & N. Ry. Co., 72 N. Y. 245. In the case cited, the forfeiture clause required every such corporation to begin the construction of its road and expend thereon 10 per cent. of its capital within five years after its articles are filed and recorded, and declared that in case of nonperformance "its corporate existence and powers shall cease," the court, per ALLEN, J., said: "Upon the contingency it needed no action or judicial proceeding to declare or compel a forfeiture of the charter and loss of corporate powers. The statute executed itself, and the nonexistence of the corporation could be alleged in opposition to this application by the respondents." (In condemnation proceedings.)

The same point was decided in the later case of the Brooklyn Steam T. Co. v. City of Brooklyn, 78 N. Y. 524; and in the Matter

of B. W. & N. R. Co., 81 id. 69, it was held that the corporation by leasing a portion of the road covered by its franchise to another corporation, with the right to lay tracks thereon, not for the purpose of constructing the road of the lessor, but to enable the lessee to complete its own road, the tracks, when built, not to belong to the lessor or to be operated by it, but to be constructed at the expense of and be operated and maintained for the use of the lessee exclusively, would not save the charter from forfeiture.

Peavey v. Calais R. Co., 30 Me. 498. A statute provided that if any railroad corporation should not, within two years after its incorporation, construct and put in operation at least ten miles of its proposed road, "such corporation shall forfeit its corporate existence, and its powers shall cease as far as it relates to that portion of said road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation."

*Held,* self-executing. Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co., 2 Tex. Civ. App. 650, 22 S. W. 107, 23 id. 1012.

Where an act provided that upon certain failures to comply with specified requirements, the rights and privileges granted should revert to the Commonwealth, it was held that judicial

The forfeiture clause which ends the corporation without a direct judicial procedure to declare the forfeiture must amount to an express limitation upon the original grant of

action or other legislation on the happening of the event was unnecessary. Commonwealth v. Lykens Water Co., 110 Pa. St. 391. So held as to an act incorporating a railroad company attaching a condition to the grant that it should construct and equip its road and branches within a specified time, or upon failure to do so, all unbuilt portions thereof, "with the property, rights, and franchises appertaining thereto, shall be absolutely forfeited, and shall revert to the State without any further act or ceremony whatever." State v. St. Paul, etc., R. Co., 35 Minn. 224, 28 N. W. 245. So held, too, where the act provided that if the company should fail to complete its railroad between certain points within a specified time, it "shall forfeit to the State of Virginia their corporate franchises and rights, together with their railroad track, roadbed, and all work and materials thereon, and other property, to hold the same as a trustee for the benefit of creditors, the corporation of Fredericksburgh and other private stockholders of the original Fredericksburgh Railroad Company, according to the respective amounts of the stock in that company originally subscribed and held by them." Silliman v. Fredericksburgh, etc., R. Co., 27 Gratt. (Va.) 119.

Where the charter provided that the corporation making default in the payment of a State loan and ap-

plying for a renewal thereof should consent to a forfeiture of its charter,—*Held*, that upon the default, the charter was, *ipso facto*, surrendered without any judicial proceedings for the purpose. Mobile, etc., R. Co. v. State, 29 Ala. 585. But where the act provided that on the foreclosure of a mortgage upon the property and franchise of a railroad corporation the corporation should be dissolved, it was held that an illegal and fraudulent sale upon such a foreclosure would not work a dissolution. White Mountains R. Co. v. White Mountains R. Co., 50 N. H. 50.

Forfeiture clauses held self-executing in other cases:

*United States*.—Lothrop v. Steadman, 13 Blatchf. (U. S.) 143.

*Alabama*.—Mobile, etc., R. Co. v. State, 39 Ala. 573.

*California*.—Oakland R. Co. v. Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181.

*Connecticut*.—New York, etc., R. Co. v. Boston, etc., R. Co., 36 Conn. 196.

*Kansas*.—Atchison St. R. Co. v. Nave, 38 Kan. 444, 5 Am. St. Rep. 800, 17 Pac. 587.

*Massachusetts*.—Crease v. Babcock, 23 Pick. (Mass.) 343, 34 Am. Dec. 61.

*Missouri*.—Ford v. Kansas City, etc., R. Co., 52 Mo. App. 429.

*New Jersey*.—Elizabethtown Gas Light Co. v. Greene, 46 N. J. Eq. 118.

*New York*.—Matter of Kings.

corporate power.<sup>1</sup> Not every nonuser, not every misuser, will furnish sufficient ground for forfeiture. To work a forfeiture, there should be something wrong; and not only a wrong, but one arising from willful abuse or improper neglect, indicating an indifference to the demands of public duty, unless the act or omission is made by statute a cause of forfeiture, irrespective of its intent or character.<sup>2</sup> Forfeitures

Co. El. R. Co., 41 Hun (N. Y.), 426; Kennedy v. Strong, 14 Johns. (N. Y.) 128.

*Texas.*—Bywaters v. Paris, etc., R. Co., 73 Tex. 624, 11 S. W. 856; Galveston, etc., R. Co. v. State, 81 Tex. 572, 17 S. W. 67; Houston v. Houston Belt, etc., R. Co., 84 Tex. 590; Gulf City R. Co. v. Gulf, etc., R. Co., 63 id. 529.

The legislature has undoubtedly power to provide in an act of incorporation that corporate existence shall cease by the mere failure of the corporation to perform certain acts imposed by its charter. New York, etc., Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088.

In Crease v. Babcock, 23 Pick. (Mass.) 342, 34 Am. Dec. 61, MORTON, J., stated that Chancellor Kent made, "with some appearance of reluctance," the statement that if a charter be granted and accepted with reservation or upon a condition, there seems to be no ground to question the validity and efficiency of the reservation. 2 Kent Com. 306.

The charter of a street railway company is not void because it has located its road on part of a street to which another street railroad company claims a prior right.

Union R. Co. v. Philadelphia, etc., Co., 6 Del. Co. Rep. 490. Nor is it void because it includes in part of its road a street which another company has obtained an unexecuted right to occupy in a certain time, particularly where the two companies have settled their controversy by agreement. Chester Traction Co. v. Philadelphia, etc., Co. (C. P.), 6 Del. Co. Rep. 481.

1. Day v. O. & L. C. R. Co., 107 N. Y. 129, 139, 13 N. E. 765.

2. People v. A. A. R. Co., 125 N. Y. 513, 519, 26 N. E. 622; Chicago City Ry. Co. v. People, 73 Ill. 541. The limitations of the original act are not abrogated by being left out of the amendatory act. The two acts must be read and construed together, and the amendments must be read as if incorporated in the original act, and all the provisions of the original act remain in force except as modified. Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524, 531; Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 45; Baker v. Backus, 32 Ill. 79; State v. Fagan, 22 La. Ann. 546; Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71; Knowlton v. Atley, 8 Cush. (Mass.) 95; People v. Runkle, 9 Johns. (N. Y.) 147; Bradt

are not favored, and in construing forfeiture clauses the courts are generally opposed to a construction supporting a forfeiture *ipso facto*, without judgment of dissolution in a judicial proceeding;<sup>3</sup> and require those who challenge the existence of franchises on the ground of failure to comply with a specified condition under which the grant was made, to bring themselves strictly within the provisions of the charter under which they claim the right of forfeiture arises.<sup>4</sup>

v. Benedict, 17 N. Y. 93; Mickels v. Rochester City Bank, 11 Paige (N. Y.), 118, 42 Am. Dec. 103; Blake v. Hinkle, 10 Yerg. (Tenn.) 218.

Where a bank charter provided that in case of a suspension of specie payment for more than ninety days the charter should be, *ipso facto*, forfeited and void, it was held that the happening of the contingency merely gave the State the right to enforce the forfeiture in a proper judicial proceeding. Atchafalaya Bank v. Dawson, 13 La. 497.

3. Santa Rosa City R. Co. v. Center St. R. Co. (Cal.), 38 Pac. 989. In the case cited the court, per VAN FLEET, J., said: "It is obvious that the requirement as to the completion of the work within a given time was a condition subsequent. It is a general rule that none but the creditor or his heirs could avoid a grant for failure to perform a condition subsequent; and in case of a public grant the right to avoid it on that ground is confined to the government and can be exercised only through the judgment of a court or by a legislative declaration of forfeiture. It

follows that where such condition is imposed by statute, a failure to perform it will not, *ipso facto*, avoid the grant unless so declared by the statute creating the condition. Unless the statute by express terms or by plain implication so declares, no forfeiture will take place without a judicial, or at least a legislative, determination to that effect." And see Oakland R. Co. v. Oakland, etc., R. Co., 45 Cal. 365; Chicago v. Chicago, etc., R. Co., 105 Ill. 73; Hughes v. Northern Pac. Ry. Co., 18 Fed. 106.

4. People v. Los Angeles El. Ry. Co. (Cal.), 27 Pac. 673; People v. A. A. R. Co., 125 N. Y. 513, 26 N. E. 622; Matter of B. W. N. Ry. Co., 72 N. Y. 245. An exclusive right granted to a street railway company to operate its line in the city is such a property right as will entitle it to raise by injunction the question of forfeiture, by failure to perform the conditions of the charter of a company which is granted the right to build a street railway in certain streets of the city. Wilmington City Ry. Co. v. Wilmington, etc., Co. (Del. Ch.), 46 Atl. 12.

A New York statute provides for a forfeiture if the road be not built within a time limited.<sup>5</sup>

**§ 12. Legislative control of streets.**—The right of the legislature over the public highways, and to grant the use thereof for the public convenience and travel, so long as it does not impose additional servitudes upon the property and does not materially obstruct the public use by ordinary and accustomed methods, is undoubtedly.<sup>6</sup> It has power to authorize the construction of a railroad in a city street without the consent of the municipal authorities, even though the city charter confers on the city council the authority to grant the right to construct such a road.<sup>7</sup> But the control of the streets

**5. "§ 99. Within what time road to be built."**—In case any such corporation shall not commence the construction of its road, or of any extension or branch thereof within one year after the consent of the local authorities and property-owners, or the determination of the general term as herein required, shall have been given or renewed, and shall not complete the same within three years after such consents, its rights, privileges and franchises in respect of such railroad extension or branch, as the case may be, may be forfeited. If the performance of any such act, within such time, is prevented by legal proceedings in any court, such court may also extend such time for such period as the court shall deem proper. The time for compliance with this requirement in this or any former act, by a street surface railroad corporation incorporated

for the purpose of constructing a street surface railroad only, wholly south of the Harlem river and in cities of over twelve hundred thousand inhabitants and which has heretofore obtained such consents, is hereby extended until June thirtieth, eighteen hundred and ninety-five. (As amended by chap. 676 of 1892, chap. 434 of 1893, § 1.)" 3 Heyd. Gen'l Laws (2d ed.), 3316.

6. Paterson Ry. Co. v. Grundy, 4 Am. Electl. Cas. 173, 182, 51 N. J. Eq. 213; Domestic Telephone & Telegraph Co. v. Newark, 20 Vroom (N. J.), 344, 346.

7. In most States however by constitutional provisions the use of the streets for railroad purposes cannot be had without municipal grant.

Chicago & Illinois Steel Co., 66 Ill. App. 561. In authorizing a street railroad company to occupy public streets, the State legisla-

within a municipality is now quite generally delegated to the local authorities, who are given the right to take final action in a procedure resulting in the creation of the franchise.<sup>8</sup> The main purpose of streets or highways being to facilitate travel and transportation, new and improved agencies for effecting that purpose must be presumed to have been in contemplation, in addition to those in existence when the ways were established. An occupation of the streets otherwise than for travel and transportation is presumptively inferior and subordinate to the dominant easement of the public for highway purposes, for if not so, the primary object of their dedication or appropriation might be largely defeated. And the fact that permission is granted to occupy the streets or highways for a purpose other than travel, does not confer a prior and paramount right to occupy them to the exclu-

ture does so subject to the power of municipal corporations to enact such ordinances as do not unreasonably interfere with the exercise of the franchises granted; *e. g.*, an ordinance prohibiting a street railway company from placing salt on its tracks. State, etc., Co. v. City of Elizabeth, 34 Atl. 146. The provision of a city charter making it unlawful to grant the right to construct a street railroad, except to one who will agree to carry passengers thereon at the lowest rate of fare, is superseded by a general statute giving every railroad corporation the power to construct its road upon any highway which its route shall take, subject to the limitations of such charter. Adamson v. Nassau El. Ry. Co., 89 Hun (N. Y.), 261, 68 St. Rep. (N. Y.) 851, 34 N. Y. Supp. 1073.

And see Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co., 35 Barb. (N. Y.) 364; Harrisburg City Pass. Ry. Co. v. Harrisburg (Pa.), 24 Atl. 56; Paterson, etc., Horse R. Co. v. Paterson, 24 N. J. Eq. 158; Milwaukee v. Milwaukee, etc., R. Co., 7 Wis. 852; Chicago, etc., R. Co. v. Newton, 36 Iowa, 299.

8. Ghee v. Northern Union Gas Co., 158 N. Y. 510, 513, 53 N. E. 692. The power which the State primarily had, over the streets and highways in the State or in any city of the State, has, in St. Louis, been transferred to that city; and the general assembly has no power to authorize the construction, operation, or transfer of any street railway in that city without its consent. State, Crow v. Lindell R. Co., 51 Mo. 162, 52 S. W. 248.

sion of their use for travel in a mode different from that which obtained when such permission was given.<sup>9</sup>

9. Cincinnati Inclined Plane Ry. Co. v. Cincinnati, etc., Tel. Assn., 3 Am. Electl. Cas. 443, 48 Ohio St. 390, 27 N. E. 890; Hudson River Tel. Co. v. Watervliet Turnp. & R. Co., 135 N. Y. 393, 32 N. E. 148; Taggart v. Newport St. R. Co., 16 R. I. 668; Macomber v. Nichols, 34 Mich. 212. In the Hudson River Tel. Co. Case, 135 N. Y. 393, *supra*, the court, at page 404, said: "It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future. If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be construed to encourage, rather than to embarrass the inventive and progressive tendency of the people."

In construing a statute enacted before the days of electric railroads, authorizing the construction of "street or horse railways," the legislature would be presumed to have intended the use of such im-

proved motive power as future invention might produce and public utility and convenience require; and thus the statute should be given a construction broad enough to include the use of electricity. Lonergan v. La Fayette St. Ry. Co. (Ind.), 3 Am. Electl. Cas. 273. An act conferring upon cities the right to the use of any motive power whatever, or any combination of motive power, upon their street railways, authorizes the use of electricity or any other improved method of locomotion, although not invented or discovered at its passage. Detroit City R. Co. v. Mills, 85 Mich. 634, 10 Ry. & Corp. L. J. 104, 46 Am. & Eng. R. Cas. 608, 48 N. W. 1007.

It is not necessary for the declaration of incorporation, or the charter granted by the act of the legislature, or the consent of the municipal authorities to limit the number of tracks to be constructed upon the streets, or to designate the exact location of the tracks of said company latitudinally upon the streets along which the company proposes to construct its railway. Baker v. Selma St. & S. Ry. Co. (Ala.), 30 So. 464.

## CHAPTER II.

### The Franchise; How Acquired; How Limited.

- SECTION**
- 1. Its character; how distinguished from charter or license.
  - 2. Power of municipality to grant.
  - 3. Municipality; how further controlled in granting franchise.
  - 4. Certificate of public convenience and a necessity.
  - 5. Consent of local authorities.
  - 6. Consents of abutting property-owners.
  - 7. Bids for franchise.
  - 8. Extensions.
  - 9. Proceedings, if property-owners do not consent.
  - 10. Proceedings without consent; how prevented.
  - 11. Conditions imposed with consent; rights of the grantee and public thereunder.
  - 12. When consents may be presumed.
  - 13. Acceptance of franchise.
  - 14. Rights under franchise; how and by whom questioned.
  - 15. Conflicting grants of franchises.
  - 16. Sale or lease of franchise and property.
  - 17. Abandonment or revocation of the franchise.
  - 18. Expiration of franchise and renewal.
  - 19. Forfeiture; how waived.
  - 20. When specific performance of contract for mutual co-operation in securing franchise, will be refused.

#### **§ 1. Its character; how distinguished from charter or license.—**

Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State.<sup>1</sup> Corporate franchises are of two kinds or classes; the one, the right of the members to exist as a corporate body, evidence by the charter or articles of incorporation, the legis-

<sup>1</sup>. *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519, 595, 10 L. Ed. 274, 311.

lature under the reserve power to repeal may take away at any time; the other, the powers and privileges vested in and to be exercised by the corporate body as such, are the franchises of, or belonging to, the corporation, which are inseparable from its tangible property, and which, as property, will survive the dissolution of the corporation itself.<sup>2</sup>

2. "The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises." Memphis, etc., R. Co. v. Berry, 112 U. S. 609, 621, 28 L. Ed. 837, 841. And see Hazleton Boiler Co. v. Hazleton Tripod Boiler Co., 137 Ill. 233, 28 N. E. 248.

At common law it has been held that real estate acquired for the use of a canal company cannot be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise. Gue v. Tide Water Canal Co., 65 U. S. (24 How.) 254, 16 L. Ed. 635. The tracks of a railroad company, and the franchise of maintaining and operating its road in a public street are also inseparable, in the absence of express legislative authority providing for their severance. The statute of New York

authorizing the sale of the franchise and property of a railroad company on execution seems to recognize the indissolubility of the connection between the corporeal property and its incorporeal right of enjoyment. People v. O'Brien, 111 N. Y. 1, 47, 18 N. E. 692. "The term 'franchise' has several significations, and there is some confusion in its use. The better opinion, adopted from the authorities, seems to be that it consists of the entire privilege embraced in and constituting the grant." Bridgeport v. N. Y., etc., R. Co., 36 Conn. 266. A statute authorizing a village to issue bonds for water works is not the grant of a corporate franchise. Brady v. Moulton, 61 Minn. 185, 63 N. W. 489; Attorney-General v. Chicago, etc., R. Co., 35 Wis. 425. "The kinds of business which corporations organized either under title II, chapter 34 (of Gen. Stat. 1878), or under the act of 1873, are authorized to carry on, are powers but not franchises, because it is a right possessed by all citizens who choose to engage in it, without any legislative grant. The only franchise which such corporations possess is the general franchise to be or exist as a corporate entity. Hence if they engage in any business not authorized by the statute

The latter class of franchises cannot be affected by legislation freed from the restrictions of the Federal Constitution as to the impairment of the obligation of contracts and interference with vested rights, except that the right reserved to the legislature to alter and amend, confers power to pass all needful laws for the regulation and control of the domestic affairs of the corporation.<sup>3</sup> And this right, in part at least, is generally delegated to municipal authorities. These authorities may ordinarily determine and dictate in what manner and upon what conditions the corporation may exercise the franchises conferred by the State, but nothing more.<sup>4</sup> Not all privileges however of a corporation are

it is *ultra vires*, or in excess of their powers, but not a usurpation of franchises not granted, nor necessarily a misuser of those granted." *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 225, 41 N. W. 1020.

"It is not necessary in this case that we should hold that the franchise of this company, to be a corporation, is a subject of sale or transfer. The right to build, own, manage, and run a railroad, and take the tolls thereon, is not of necessity of a corporate character or dependent upon corporate rights. It may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable." *Middlebury Bank v. Edgerton*, 30 Vt. 190; *Peter v. Kendall*, 6 B. & C. 703, 13 E. C. L. 299.

In *Ev. L. St. J. O. H. v. Buffalo Hyd. Assn.*, 64 N. Y. 561, 565, it was held that the estate and interest of a corporation in real property, whether a mere easement or

a right of possession or title in fee, was the subject of a sale as property distinguished from the incorporeal franchises of the company, under the act of incorporation. And see *Griffin v. Spencer*, 6 Hill (N. Y.), 525; *Goodrich v. Burbank*, 12 Allen (Mass.), 459.

In New York the statute provides that whenever any street surface railroad corporation shall have been dissolved or annulled, or its charter repealed, the consents authorizing its construction shall continue in full force, efficacy, and being, and shall be sold at auction to the local authorities. The Railroad Law, chap. 565 of 1890, § 105, as amd. by chap. 676 of 1892, 3 Heydecker's Gen. Laws (2d ed.), 3320.

3. *People v. O'Brien*, 111 N. Y. 1, 48, 18 N. E. 692; *Munn v. Illinois*, 94 U. S. (4 Otto) 113, 24 L. Ed. 77.

4. *Chicago City Ry. Co. v. People*, 73 Ill. 541, 548. And see *Oakland, etc., R. Co. v. Brooklyn, etc., R. Co.*, 45 Cal. 365.

franchises; for example, the immunity of particular property of a corporation from taxation is a privilege which may sometimes be transferred under that designation;<sup>5</sup> but such immunity is not itself a franchise of a railroad corporation which passes as such, without other description, to a purchaser of its property.<sup>6</sup> The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as the franchises to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked.<sup>7</sup> There are certain other privileges, too, which are merely licenses, and not franchises, as where a corporation has a specific power to construct, maintain, and operate a railroad in a city, subject however to the consent of the city, and in such manner and upon such conditions as the city may impose; if the city, by ordinance, grants the privilege of constructing and operating the railroad upon a certain street, the grant by the municipality is a mere license and not a franchise.<sup>8</sup> If the right is not exercised within the

5. *Humphrey v. Pegues*, 83 U. S. (16 Wall.) 244, 21 L. Ed. 326.

6. *Morgan v. Louisiana*, 93 U. S. (3 Otto) 217, 23 L. Ed. 860.

7. *Morgan v. Louisiana*, 93 U. S. (3 Otto) 217, 23 L. Ed. 860; *Chesapeake & Ohio Ry. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121; *Morawetz Corp.*, § 924; *Cook v. Detroit*, etc., R. Co., 43 Mich. 349, 5 N. W. 390; *Eldridge v. Smith*, 34 Vt. 484; *Pierce v. Emery*, 32 N. H. 484; *Coe v.*

*Columbus, etc., R. Co.*, 10 Ohio St. 372; *Meyer v. Johnson*, 53 Ala. 237; *Mayor v. Norwich*, etc., R. Co., 109 Mass. 103.

8. *Belleville v. Citizens' Horse R. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *Chicago City Ry. Co. v. People*, 73 Ill. 541; *Atchison St. Ry. Co. v. Mo. Pac. R. Co.*, 31 Kan. 660. And see *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. Ed. 87. Where the statute grants a board of aldermen full

time limited by the ordinance,<sup>9</sup> or if exercised and subsequently abandoned,<sup>10</sup> it may be conferred by the city upon another company without first procuring a judicial decree of forfeiture. Where, by location in city streets under legislative authority and municipal grant, the railroad has acquired a right of way, its franchise consists in the right to lay and use exclusively a railroad, subject to the duty of running cars thereon. It has no interest in, or control over, that part of the street or avenue not occupied by its own road, except that common to the rest of the community, viz., that it shall be kept free and clear for public use.<sup>11</sup> And under the authority usually delegated to municipalities an exclusive or perpetual right to use a street for a street surface railroad cannot be conferred. Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly; consequently, those

power to lay horse railroad tracks and regulate the running of cars thereon, a license to a railroad corporation to reasonably use a highway is not such appropriation of an additional easement as, without special provision therefor, will entitle abutting owners to compensation; it violates no constitutional right. Attorney-General v. Met. R. Co., 125 Mass. 515. A permission to occupy a street is not "a special privilege or immunity," within the meaning of the constitutional inhibition. Atchison St. Ry. Co. v. Mo. Pac. R. Co., 31 Kan. 660.

9. Atchison St. R. Co. v. Nave, 38 Kan. 744, 36 Am. & Eng. R. Cas. 29.

10. Great Central R. Co. v. Gulf, etc., R. Co., 63 Tex. 529, 26 Am. & Eng. R. Cas. 114. "If the State in granting a franchise imposes a limitation or condition that a certain thing shall be completed within a given time, no other power can waive a forfeiture arising from the nonperformance of the condition. But when a mere license is granted by a city upon conditions subsequent, it may, for satisfactory reasons, waive a strict performance of the condition." Chicago City R. Co. v. People, 73 Ill. 541.

11. N. Y. & H. R. Co. v. Forty-second St., etc., R. Co., 50 Barb. (N. Y.) 285.

given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.<sup>12</sup> The franchise, that is the right to construct, maintain, and operate a railroad in the public streets, cannot be sold on execution,<sup>13</sup> nor will an action lie at law to recover damages against one claimed to have usurped the right, nor to recover possession of the franchise.<sup>14</sup> If by contract with municipal authorities a street railroad company is given a right to operate a railroad in certain streets to the exclusion of all others, the right thus acquired, although a property right, is not a franchise, unless the statute expressly authorized the city to grant such exclusive right.<sup>15</sup> But a right secured to it by the State itself, by special act of the legislature, to charge a specified rate of fare is a privilege or franchise in the nature of property which vests in the corporation, and until repealed is entitled to the same protection from invasion as

12. Detroit Citizens' St. R. Co. v. Detroit Ry., 171 U. S. 48, 43 L. Ed. 67, 18 Sup. Ct. Rep. 732, affg. 110 Mich. 384, 35 L. R. A. 859, 3 Det. L. N. 377, 5 Am. & Eng. R. Cas. (N. S.) 15, 28 Chicago L. N. 409, 68 N. W. 304. In the case cited, the statute considered provided that the corporations formed to use a street for street railroad purposes should have the exclusive right to use and operate any railroads constructed, owned, or held by them, provided that they should not construct a railroad through the streets of any town or city without the consent of the municipal authorities.

13. N. Y. & H. R. Co. v. Forty-

second, etc., R. Co., 50 Barb. (N. Y.) 285.

14. Budd v. Multnomah St. Ry. Co., 15 Oreg. 404, 15 Pac. 654.

15. Milhau v. Sharp, 27 N. Y. 811. In the case cited it was held that a resolution of the common council authorizing private persons to construct and operate a railroad upon certain conditions, without limitation as to time, or reserving a power of revocation, was not license, nor an act of municipal legislation merely, but a contract, which, if valid, it could not abrogate. And see Met. St. Ry. Co. v. Chicago, etc., Ry. Co., 87 Ill. 317.

any other species of property. It is alienable, transferable by mortgage, and passes with the property to a purchaser under a judgment in foreclosure, or may be transmitted by conveyance and by consolidation of different corporations.<sup>16</sup>

**§ 2. Power of municipality to grant.**—Street surface railroads had their origin in the days of special legislation. Each company then had its own act of incorporation, in which its route was described and its powers defined. These companies were confined to the cities and large towns of the State, and their cars were moved by horse power, and were a substitute for the omnibus and other vehicles devoted to the carriage of passengers, which had been previously in common use. In later years, under constitutional limitations, general laws have been passed in most of the States providing for the organization of these companies to construct, maintain, and operate street surface railroads, for public use, and limited in many States to the conveyance of passengers. These general laws usually confer upon the local authorities over streets and highways power to control the location, construction, and operation of the railroad, and prohibit the use of streets for railroad purposes without their consent.<sup>17</sup> The State determines for each of its municipal corporations the powers it should exercise and the capacities it should possess, and what restrictions should be placed upon these, as well to prevent clashing of action and interest in the State as to protect individual corporators against injustice and oppression at the hands of the local majority.<sup>18</sup>

16. Parker v. E. C. & M. R. Co., 165 N. Y. 274, 280.

17. Penn. Ry. Co. v. Mont. Co. Pass. Ry. Co., 5 Am. Electl. Cas. 166, 167 Pa. St. 62.

18. Detroit Citizens' St. Ry. Co. v. Detroit Ry. Co., 171 U. S. 48, 43 L. Ed. 67.

The power to grant a franchise does not exist in the local authority unless unmistakably conferred by the legislature or indispensably necessary to the exercise of some other power expressly conferred.<sup>19</sup> And a statute in general terms authorizing a municipality to grant such a franchise will not be construed to permit it to give a company the exclusive or the perpetual right to operate a street surface railroad in a public street.<sup>20</sup> While city authorities have no right to grant street railway franchises, except in so far as they may be authorized by the legislature, and then only in the manner and under the conditions prescribed by the statute;<sup>21</sup> yet, where power is given by the charter of the company to lay its track along the streets of a city, the city authorities may consent to such use of its streets by the company, although there may be no express power in the charter of the city authorizing it to grant such a privilege.<sup>22</sup> An irrepeal-

19. Detroit Citizens' St. Ry. Co. Case, *supra*; Louisville & N. R. Co. v. Mobile, J. & C. K. R. Co., 26 So. 895.

20. Detroit Citizens' St. Ry. Co. Case, *supra*. A city has no power or authority to confer upon any corporation the exclusive right to use one of its streets for its own business. *Grand Ave. Ry. Co. v. People's Ry. Co.* (Mo.), 6 Am. Electl. Cas. 99; *St. Louis Transfer Ry. Co. v. St. Louis, etc., Terminal Ry. Co.*, 111 Mo. 666, 20 S. W. 319; *Birmingham, etc., Ry. Co. v. Birmingham St. Ry. Co.*, 78 Ala. 465.

21. *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, 152, 47 N. E. 277.

22. *Almand v. Atl., etc., Ry. Co.*, 108 Ga. 417, 33 S. E. 6; *Gaedeke*

v. Sim. R. Co.

43 App. Div. (N. Y.) 514. In the absence of a statute there is no implied restriction springing from public policy upon the power of a city to grant a street easement to a railroad or street car company, having the requisite franchises from the State, unlimited as to time. *Louisville Trust Co. v. Cincinnati* (C. C. App. 6th C.), 76 Fed. 296, 22 C. C. A. 234, 47 U. S. App. 36. Where a railroad track is laid down in a street, by authority of the city council, to connect a private manufacturing establishment with other railroad tracks, it becomes a public highway and the city council has the right to devote the operation of the street to that use. *Parlin v. Mills*, 11 Ill. App. 396. A railroad may be per-

able contract for the use of a street by a street railroad company can be made by a municipal corporation which is invested with full power to regulate and control the use of streets; and it has been held that such irrevocable consent can be given under a statute providing that companies may construct such railroads "with the consent of the corporate authorities," especially when other statutes provide for the giving of mortgages on such railways, which shall be deemed mortgages upon realty.<sup>23</sup> A street railroad company cannot build under its charter alone. It must have the consent of the proper municipal or local authorities, or it cannot move. If the proposed line passes through a city, borough, or township intermediate the termini, and that city, borough, or township refuses its permission, the power to build the road described in the application and charter cannot be exercised. It must be possible for the company to complete its line, before it has the right, as against any city, borough, or town-

mitted by the city authorities to use a highway reserved for public use as a highway and for other public uses, under an act of Congress which provides for platting lands into towns. *Burlington Gas Light Co. v. Burlington, etc., Co.*, 165 U. S. 370, 41 L. Ed. 749, 17 Sup. Ct. Rep. 359.

The city council of Montreal may, by resolution, authorize the construction in the city streets of a temporary electric railway intended to accommodate visitors to an exhibition, saving the recourse of persons damaged by such construction; if there be question as to its power, a by-law subsequently passed, authorizing the construction, is a sufficient ratification.

*Bell Telephone Co. v. Montreal St. R. Co.* (Rap. Jud. Quebec), 6 B. R. 223. A street railroad company cannot acquire the right to turn cars forty-seven feet long at the intersection of two principal business streets of a city without obtaining the right to do so from the common council. *Rapid R. Co. v. Mt. Clement*, 118 Mich. 133, 76 N. W. 318.

*23. Baltimore Trust & G. Co. v. Baltimore* (C. C. D. Md.), 64 Fed. 153; *Detroit Citizens' St. Ry. Co. v. Detroit* (C. C. App. 6th C.), 12 C. C. A. 365, 64 Fed. 628, 26 L. R. A. 667, 1 Am. & Eng. R. Cas. (N. S.) 71. And see *Coney Isl., F. H. & B. R. Co. v. Kennedy*, 15 App. Div. (N. Y.) 588.

ship into which its line extends, to begin work. It is not possible for such company to complete its line, without the consent of the local authorities of the districts through which it passes; and where this is refused in one or more of the municipal or quasi-municipal divisions through which its line runs, the building of its proposed road under its charter is an impossibility.<sup>24</sup> The power to regulate the use of streets for railroad purposes is a continuing one, and a city council cannot, by one exercise thereof, deprive succeeding councils of the power to exercise it again when necessary in the public interest.<sup>25</sup> The power of the municipality in the procedure by which the franchise to construct and operate a street surface railroad is granted, being such only as is expressly conferred, or necessarily implied from other powers expressly conferred, or duties definitely prescribed, in the consideration of any case which may arise or of any decision reported, the statute laws of the State upon the subject must be carefully studied. It is impossible within the scope of this work to introduce and report all the statutes relating to street surface railroads in the various States. In the notes that portion of the New York Railroad Law (statute) having a special reference to street surface railroads will appear as illustrating, quite generally, the statute law of the various States.<sup>26</sup>

24. Penn. R. Co. v. Mont. Co. Pass. R. Co., 5 Am. Electl. Cas. 166, 173, 167 Pa. St. 62; Rahn Township v. Tamaqua, etc., R. Co., 167 Pa. St. 84, 36 W. N. C. 165, 31 Atl. 472; Penn. R. Co. v. Turtle Creek, etc., Ry. Co., 36 Atl. 348; West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163; Reading Co. v. Schuylkill

Valley Traction Co., 14 Mont. Co. L. Rep. 10; Perkiomen v. Same, id. 22.

25. New Orleans City Ry. Co. v. New Orleans, 44 La. Ann. 748, 11 So. 77, 50 Am. & Eng. R. Cas. 391.

26. The statute especially devoted to street surface railroads in New York is comprised in sections 90 to 110 of the Railroad

**§ 3. Municipality; how further controlled in granting franchise.**—The ordinary and incidental powers of a municipal corporation are not broad enough to include the power to grant street railway franchises, whereby any man or com-

Law, chapter 565 of 1890; chap. 39 of the Gen. Laws, 3 Heydecker's Gen. Laws (2d ed.), pp. 3306-3324. Section 90 contains the general provisions, and is as follows:

"The provisions of this article shall apply to every corporation which, under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate, a street surface railroad, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons and property for compensation, upon and along any street, avenue, road, highway, or private property, in any city, town or village, or in any two or more civil divisions of the State, and every such corporation must comply with the provisions of this article. Any street surface railroad corporation, at any time proposing to extend the road or to construct branches thereof, may, from time to time, make and file in each of the offices in which its certificate of incorporation is filed, a statement of the names and descriptions of the streets, roads, avenues, highways, and private property in or upon which it is proposed to construct, maintain or operate such extensions or branches. Upon filing any such statement and upon complying with the conditions set forth in section ninety-one of the

railroad law, every such corporation shall have the power and privilege to construct, extend, operate and maintain such road, extensions or branches, upon and along the streets, avenues, roads, highways and private property named and described in its certificate of incorporation or in such statement. Every such corporation, before constructing any part of its road upon or through any private property described in its articles of association or certificate of incorporation or statement, and before instituting any proceeding for the condemnation of any real property, shall make a map and profile of the route adopted by it upon or through any private property, which map and profile shall be certified by the president and engineer of the company, or a majority of its directors, and shall be filed in the office of the clerk of the county in which the road is to be constructed, and all provisions of section six of the act hereby amended so far as applicable shall apply to the route so located. If any such street surface railroad company is unable to agree for the purchase of any such real property, or of any right or easement therein required for the purpose of its railroad, or if the owner thereof shall be incapable of selling the same, or if, after diligent search and inquiry, the name and residence of such owner can-

pany of men may possess a right from which the public generally are excluded.<sup>27</sup> While the legislature can authorize municipal authorities to permit private corporations to construct and operate street railway lines upon the streets, the authority thus conferred must be exercised within the limits of reasonable discretion, and not so as to materially injure the property of abutting owners. The entire width of the street cannot, under general legislative authority, be given up to railroad purposes.<sup>28</sup> Where the city council is author-

not be ascertained, it shall have the right to acquire title thereto by condemnation in the manner and by the proceedings prescribed by the condemnation law. Nothing in this section shall be deemed to authorize a street railroad corporation to acquire real property within a city by condemnation. (As amended by chap. 676 of 1892, chap. 434 of 1893, and chap. 995 of 1895.)"

27. *Eichels v. Evansville St. Ry. Co.*, 78 Ind. 261; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201; *Potter v. Collis*, 156 id. 16, 17, 50 N. E. 413; *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 682; *Blake v. Winona, etc., R. Co.*, 19 Minn. 418. The privileges of a street railroad company are determined, not by the ordinances under which, with the consent of the majority of the electors, it is given the right to use the streets of a city, but by the general law. *Lincoln St. Ry. Co. v. City of Lincoln (Nebr.)*, 84 N. W. 802. A special legislative enactment, authorizing a city to open, grade, and pave a street as soon as a turnpike company should release all of its interest in such portion of the high-

way lying within the city limits, contemplates a release by the company of the right to operate a passenger railway which it purchased at judicial sale. *West Philadelphia Pass. Ry. Co. v. Philadelphia, etc., Turnpike Road Co.*, 186 Pa. St. 459, 40 Atl. 787.

28. *Block v. Salt Lake City R. T. Co. (Utah)*, 4 Am. Electl. Cas. 189, 199, 8 Am. R. & Corp. Rep. 327. An ordinance requiring a street railway company to run its lines along narrow streets, over a narrow bridge, and near to existing tracks, is unreasonable, and the courts may so declare it under the Rhode Island statutes. *Woonsocket St. Ry. Co. v. City of Woonsocket*, 46 Atl. 272. A municipality has no authority to grant a right to lay a street railroad track in an alley and operate cars thereon, where, by reason of the narrowness of the alley, and the frequency with which the cars are required to be run, it would result in the loss of the use of the alley to the abutting owners. *Watson v. Robertson Ave. R. Co.*, 69 Mo. App. 548. Municipal consent to the laying of a street railroad on the streets of a municip-

ized to regulate the use of streets and to permit or prohibit any street railroad in any street, and has "no power to grant" the right to lay down any railroad track in any street except on a specified petition, it cannot grant the right to use a street for railroad purposes except on such petition.<sup>29</sup> Under a general grant of power to a city to permit, allow, and regulate the laying down of tracks for street cars upon such terms and conditions as the city may prescribe, it is not empowered to grant for a term of years an exclusive franchise to occupy its streets with street railroads.<sup>30</sup> Nor can it, under a general grant of power to regulate, improve, alter, extend, and open streets, lanes, and avenues, and to cause encroachments and obstructions, decayed buildings, and ruins to be removed, grant an exclusive right, by contract, to a street railroad corporation to construct railroad tracks on all streets of a city as then laid out, or that may thereafter be laid out, for a period of ten years.<sup>31</sup> It cannot grant

ipality does not authorize the laying of two distinct railroads. *West Jersey Traction Co. v. Camden Horse R. Co.*, 53 N. J. Eq. (8 Dick.) 163, 35 Atl. 49. A grant of location for tracks to a street railroad company is not void because the company's use of such location is merely temporary. *Daniels v. Commonwealth Ave. R. Co.* (Mass.), 56 N. E. 715. The local authorities are vested with a judicial discretion, and may consider the width and other conditions of the street, and if it be proposed to cross a bridge, whether the bridge has the requisite strength to support a street railroad and moving cars. The route or location of the road cannot be considered with reference to par-

ticular streets one by one, but must be viewed as a whole. *Appeal of Cherryfield & M. El. R. Co.*, 95 Me. 361, 50 Atl. 27.

29. *North Chicago St. R. Co. v. Cheetham*, 58 Ill. App. 318. The required petition is not invalid because it shows on its face that the names of some of the petitioners were signed by agents whose authority does not appear. *Tibbets v. West & S. T. St. R. Co.*, 153 Ill. 147, 38 N. E. 664, affg. 54 Ill. App. 180.

30. *Parkhurst v. Capital City R. Co.*, 23 Oreg. 471, 32 Pac. 304, 7 Am. R. & Corp. Rep. 562.

31. *Florida, C. & P. R. Co. v. Ocala St. & S. R. Co.*, 39 Fla. 306, 22 So. 692, 7 Am. & Eng. R. Cas. (N. S.) 686.

a right of way to a street railroad company over other streets than those named in the charter of the company designating its route; the charter and the ordinance must conform to give a valid grant on any street of the city.<sup>32</sup> Where its consent is not made necessary for the construction of a street railroad upon its streets, it can impose no terms on such construction.<sup>33</sup> Where it has authority to grant such a right, and the members composing its governing body impose illegal terms intended for their individual advantage, any such grant made is void.<sup>34</sup> It cannot grant the right to a company not yet legally in existence, at least as against a company previously chartered, which, with reasonable promptness, obtains a later grant of permission to use the same street.<sup>35</sup> It cannot grant to a company whose charter prohibits the use of certain motive power upon the streets the right to use such motive power thereon.<sup>36</sup> And where a railroad company has intruded upon a public street it is none the less a trespass against the owner of the fee, although the

32. Crosstown R. Co. v. Met. St. R. Co., 16 App. Div. (N. Y.) 229; Citizens' St. R. Co. v. Africa, 100 Tenn. 26, 42 S. W. 25.

33. Philadelphia v. Empire Pass. R. Co., 177 Pa. St. 382. To avoid a grade crossing at the intersection of a railroad, a street railroad company may diverge from the highway and construct its railroad on property secured for that purpose. Penn. R. Co. v. Glenwood & D. El. St. R. Co., 184 Pa. St. 227.

34. Keogh v. Pittston, etc., Ry. Co., 5 Lack. Leg. N. 242. In the case cited the right of way was obtained by promising to the councilmen passes over the road and

\$100 each for election expenses. In Lehigh Coal, etc., Co. v. Inter-Co. St. Ry. Co., 167 Pa. St. 75, 33 W. N. C. 160, 31 Atl. 471, the supervisor of the township gave consent to the construction of a street railroad on the highways of the township provided the company would employ him and his son for life at an agreed price per day; the franchise was held void.

35. Homestead St. Ry. Co. v. Pittsburgh, etc., R. Co., 166 Pa. St. 162, 27 L. R. A. 383, 30 Atl. 950, 955, 25 Pittsb. L. J. (N. S.) 357. But see Sloane v. People's El. R. Co., 7 Ohio C. C. 84.

36. Farrell v. Winchester Ave. R. Co., 61 Conn. 127, 23 Atl. 757.

municipality subsequently passed an ordinance granting the right to construct the road in the street.<sup>37</sup> But where all the steps necessary to jurisdiction have been taken at the time of the passage of the final grant, and no fraud or unfair dealings are charged, a municipality, by ordinance, establishing a street railroad, waives all irregularities.<sup>38</sup> In Michigan, the city's power of consent to the construction of a street railroad in its streets is limited in time to the life of the franchise of the company, and any easement granted will expire with the corporate life of such company.<sup>39</sup> And a municipal ordinance in that State granting to a street railroad company the exclusive privilege of extending its line through such other streets as may be determined by the common council is void, although the right to grant the privilege to other companies, in case the company designated shall not elect to build, is reserved.<sup>40</sup> When authority to grant a franchise, or to take any step in a procedure for a franchise, is given to the common council of a city, such authority cannot be delegated by it to a subordinate board or officer.<sup>41</sup> Such authority as a municipality has to grant a right of way in its streets to street surface railroads is legislative; and the exercise of discretion is not subject to

37. So. Cal. R. Co. v. S. O. P. R. Co. (Cal.), 43 Pac. 1123, 1124.

38. Hamilton v. C. & H., etc., R. Co., 9 Ohio (C. P. Dec.) 174.

39. Detroit v. Detroit City Ry. Co. (C. C. E. D. Mich.), 56 Fed. 857, 56 Am. & Eng. R. Cas. 337.

40. Detroit Citizens' St. Ry. Co. v. Detroit, 110 Mich. 384, 35 L. R. A. 859, 3 Det. L. N. 377, 5 Am. & Eng. R. Cas (N. S.) 15, 68 N. W. 304; affd., 171 U. S. 48, 43 L. Ed. 67.

41. State, Henderson v. Bell, 34 Ohio St. 194; Citizens' St. Ry. Co. v. Jones (C. C. Ark.), 34 Fed. 579; Central Crosstown R. Co. v. Met. St. Ry. Co., 16 App. Div. (N. Y.) 229. In the case last cited the dock department of the city of New York authorized the extension of a street railroad into a street not specified in the railroad company's charter.

judicial control.<sup>42</sup> Its act must be *ultra vires*, fraudulent, or such as to impair a contract or a vested right, to justify judicial intervention. If it make an unauthorized grant it cannot be made liable for any act of its grantee.<sup>43</sup> Under such authority to grant a street railroad company a right of way within its streets, limited however as to time, a grant of such right by the municipality, without any limit of time whatever, is not a valid exercise of the power, and is not good as a privilege for the time specified in the statute.<sup>44</sup>

**§ 4. Certificate of public convenience and a necessity.**—The privilege of constructing and operating a railroad is not one that exists in the incorporators as a common right; it is a privilege or franchise that is granted by the State; and can only be obtained by complying with the laws adopted by the State, regulating the granting of such franchises.<sup>45</sup> In New York a railroad corporation is prohibited from exercising any of the powers conferred by law upon such a corporation until the board of railroad commissioners shall certify that

42. Adamson v. Nassau El. R. Co., 89 Hun (N. Y.), 261.

43. Forman v. New Orleans, etc., R. Co., 40 La. Ann. 446, 4 So. 246; Murphy v. Chicago, 29 Ill. 279; Green v. Portland, 32 Me. 431; Hinchman v. Paterson Horse R. Co., 2 C. E. Green (N. J.), 75; Rowe v. Augusta Council, 24 Ga. 326.

44. In the charter of Greater New York it is provided that no franchise or right to use the streets, avenues, parkways, or highways of the city should be granted by the municipal assembly to any person or corporation for a longer period than twenty-five years. L. 1897, chap. 378, § 73.

The aldermen of Brooklyn, claiming that the charter of Greater New York had not yet taken effect, granted consent to a railroad company to operate in certain streets without any limitation as to time. It was held that the prohibition of the new charter took effect immediately upon the passage of the act, and that the exercise of power was not good as a consent for twenty-five years. Blaschko v. Wurster, 156 N. Y. 437, 53 N. E. 303; Norris v. Wurster, 23 App. Div. (N. Y.) 124.

45. Matter of A. J. & G. R. Co., 86 Hun (N. Y.), 578, 584, 33 N. Y. Supp. 1009, 67 St. Rep. (N. Y.) 878.

certain specified conditions have been complied with, and also that "public convenience and a necessity" require the construction of such railroad as proposed in its charter or articles of association.<sup>46</sup> Thus, the question of public convenience and a necessity is judicially determined at the very

46. People, *Steward v. Railroad Comrs.*, 160 N. Y. 202, 207, 54 N. E. 607.

The statute (chap. 565 of 1890, 3 Heydecker's Gen. Laws [2d ed.], 3287, 3288) is as follows:

**"§ 59. Requisites to exercise of powers of future railroad corporations.**—No railroad corporation hereafter formed under the laws of this State shall exercise the powers conferred by law upon such corporations or begin the construction of its road until the directors shall cause a copy of the articles of association to be published in one or more newspapers in each county in which the road is proposed to be located, at least once a week for three successive weeks, and shall file satisfactory proof thereof with the board of railroad commissioners; nor until the board of railroad commissioners shall certify that the foregoing conditions have been complied with, and also that public convenience and a necessity require the construction of said railroad as proposed in said articles of association. The foregoing certificate shall be applied for within six months after the completion of the three weeks' publication hereinbefore provided for. If certificate is refused no further proceedings shall be had before said board, but the application

may be renewed after one year from the date of such refusal. Prior to granting or refusing said certificate the board shall have a right to permit errors, omissions, or defects to be supplied and corrected. After a refusal to grant such certificate the board shall certify a copy of all maps and papers on file in its office and of the findings of the board when so requested by the directors aforesaid. Such directors may thereupon present the same to a general term of the supreme court of the department within which said road is proposed in whole or in part to be constructed, and said general term shall have power, in its discretion, to order said board, for reasons stated, to issue said certificate, and it shall be issued accordingly. Such certificate shall be filed in the office of the secretary of state, and a copy thereof, certified to be a copy by the secretary of state, or his deputy, shall be evidence of the fact therein stated. Nothing in this section shall prevent any such railroad corporation from causing such examinations and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose by its officers or agents and servants, to enter upon the lands or water of any person,

beginning of the corporate life of a railroad corporation; and a right of review in the courts by a writ of certiorari is insured.<sup>47</sup> The decision of the board of railroad commissioners upon the question will not be reversed unless it is made clearly to appear that it was founded upon erroneous legal principles, or was contrary to the clear weight of evidence.<sup>48</sup> In determining the question, the commissioners have the right to administer oaths to witnesses, to authorize their examination and cross-examination by counsel, and

but subject to the responsibility for all damages which shall be done thereto. (As amended by chap. 676 of 1892, and chap. 545 of 1895, § 1.)"

"**§ 59a. Railroad commissioners may certify part of the route of a street surface railroad—Power to revoke certificates—Street surface railroad extension.**—Whenever application is made by a street surface railroad company for a certificate of public convenience and a necessity as required by the provisions of the foregoing section, and it shall appear to the board of railroad commissioners, after examination of the proposed route of the applicant company that public convenience and a necessity do not require the construction of said railroad as proposed in its articles of association but do require the construction of a part of the said railroad, the board of railroad commissioners may issue its certificate for the construction of such part of the said railroad as seems to it to be required by public convenience and a necessity. In case any railroad company which shall hereafter obtain the certificate of the

board of railroad commissioners that public convenience and a necessity require the construction of the whole or a part of the said railroad shall fail to begin such construction within two years from the date of the issuing of said certificate, the board of railroad commissioners may inquire into the reason for such failure, and the said board may revoke said certificate if it shall appear to it to be in the public interest so to do. (Added by chap. 643 of 1898, § 1.)"

47. People, Steward v. Railroad Comrs., 160 N. Y. 202, 211, 54 N. E. 697; People, Loughran v. Railroad Comrs., 158 N. Y. 421; People, Babylon R. Co. v. Railroad Comrs., id. 711, 53 N. E. 1129.

48. People, Terminal R. v. Railroad Comrs., 53 App. Div. (N. Y.) 61, 65 N. Y. Supp. (99 St. Rep.) 597; affd., 164 N. Y. 572, 58 N. E. 1091; Matter of A. J. & G. R. Co., 86 Hun (N. Y.), 578, 584, 33 N. Y. Supp. 1009, 67 St. Rep. (N. Y.) 878; Matter of Auburn & Western R. Co., 37 App. Div. (N. Y.) 162; Matter of Depew & S. W. R. Co., 92 Hun (N. Y.), 407, 38 N. Y. Supp. 528, 73 St. Rep. (N. Y.) 578.

while not bound by the technical rules governing the admission of evidence in actions and proceedings pending before the courts, the commissioners are authorized to, and do, receive oral testimony, written and printed documents, and affidavits which in their opinion tend to throw light upon the question which in the end they are to pass upon, namely, whether "public convenience and a necessity" require the construction of the proposed railroad.<sup>49</sup> But affidavits expressing merely the opinion of the defendants as to whether or not the construction of the railroad would be conducive to public convenience will not alone authorize the railroad commissioners to issue the certificate.<sup>50</sup> Upon the review the court is governed, as to the preponderance of evidence, by the same rule which is applicable to a motion to set aside a verdict in an action in Supreme Court.<sup>51</sup> The board of railroad commissioners are not entitled to be heard on the appeal from their decision.<sup>52</sup> If the convenience and necessity of the public in a certain locality require the railroad, the certificate should be granted although it would enhance the value of lands in that locality desired for the purposes of the State park.<sup>53</sup> The certificate of public convenience and of necessity is not requisite where a street surface railroad is about to make, in good faith, an extension of its road.<sup>54</sup> In some of the other States the order of the

49. People, Steward v. Railroad Comrs., 160 N. Y. 202, 211, 54 N. E. 697.

50. People, Terminal R. v. Railroad Comrs., 53 App. Div. (N. Y.) 61, 65 N. Y. Supp. (99 St. Rep.) 597; affd., 164 N. Y. 572, 58 N. E. 1091.

51. People, L. I. R. Co. v. Railroad Comrs., 42 App. Div. (N. Y.)

366; Matter of Kings, Q. & S. R. Co., 6 id. 241, 39 N. Y. Supp. 1004; Matter of New Hamburg R. Co., 76 Hun (N. Y.), 76.

52. People, Steward v. Railroad Comrs., 160 N. Y. 202, 211, 54 N. E. 697.

53. Matter of Long Lake R. Co., 11 App. Div. (N. Y.) 233.

54. D., L. & W. R. Co. v.

board of railroad commissioners under the statutes controlling them is not a judgment or conclusion subject for review, but is merely the basis of an action wherein the rights of the parties are investigated and determined by prescribed rules of judicial inquiry.<sup>55</sup> "Public convenience or necessity" as used in the Connecticut statute means such a condition existing at the time of the application in respect to the applying railroad, the mode of public travel, the manner in which those needs are to be supplied, and the probable effect of the proposed road upon the whole question of adequately supplying those needs, as well as in respect to the road proposed to be paralleled and the financial ability of the applying road, that in the judgment of the trior will justify the interference with the private right of the latter road.<sup>56</sup>

**§ 5. Consent of local authorities.**—In nearly every State, as we have seen, the Constitution or some general statutory provision prohibits the construction of a street railroad in any street or highway without the consent of the local authorities having supervision of streets and highways, and a certain number of abutting property-owners, or the report of commissioners determining that the road ought to be built.<sup>57</sup> If

Syracuse L. & B. Co., 28 Misc. Rep. (N. Y.) 456; Bohmer v. Haffen, 35 App. Div. (N. Y.) 381; affd., 161 N. Y. 390.

55. State v. Mason City & Ft. D. R. Co., 85 Iowa, 516, 52 N. W. 490; Minneapolis & St. L. R. Co. v. Minnesota Railroad Comrs., 44 Minn. 336, 46 N. W. 559; W. U. T. Co. v. Mississippi Railroad Comrs., 74 Miss. 80, 21 So. 15; Railroad Comrs. v. Houston & T. C. R. Co., 90 Tex. 340, 38 S. W. 750.

56. *Re Shelton St. R. Co.*, 69 Conn. 626, 9 Am. & Eng. R. Cas. (N. S.) 186, 38 Atl. 362.

57. N. Y. Const., art. III, § 18, provides: "The legislature shall not pass a private or local bill in any of the following cases: \* \* \* Granting to any corporation, association, or individual the right to lay down railroad tracks. \* \* \* The legislature shall pass general laws providing for the cases enumerated in the section and for all other cases which, in its judgment,

may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad, except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property-owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property-owners."

The statute (§§ 91 and 92 of the Railroad Law, chap. 565 of 1890; 3 Hydecker's Gen. Laws [2d ed.], 3307, 3308) reads as follows:

"**§ 91. Consent of property-owners and local authorities.**—A street surface railroad, or extensions or branches thereof, shall not be built, extended or operated unless the consent in writing acknowledged or proved as are deeds entitled to be recorded, of the owners, in cities and villages, of one-half in value, and in towns, not within the corporate limits of a city or village, of the owners of two-thirds in value, of the property bounded on and also the consent of the local authorities having control of that portion of

a street or highway upon which it is proposed to build or operate such railroad, extension or branch, shall have been first obtained. The consents of property-owners in one city, village or town, or in any other civil division of the state, shall not be of any effect in any other city, village, or town, or other civil divisions of the state. Consents of property-owners heretofore obtained to the building, extending, operating or change of motive power shall be effectual for the purposes therein mentioned and may be deemed to be sufficiently proved and shall be entitled to be recorded, whenever such consents shall have been signed, executed or acknowledged before an officer authorized by law to take acknowledgments of deeds, or before or in the presence of a subscribing witness, and without regard to whether or not the subscribing witness shall have affixed his signature in the presence of the subscriber, provided that the proof of such signing, execution or acknowledgment shall have been made by such subscribing witness in the manner prescribed by chapter three, part two of the revised statutes. In cities the common council, acting subject to the power now possessed by the mayor to veto ordinances; in villages the board of trustees, and in towns the commissioner or commissioners of highways shall be the local authorities referred to; if in any city or county the exclusive control of any street, avenue or other property, which is to be used or occupied by any such railroad, extension or branch, is vested in any other authority,

the consent of such authority shall also be first obtained. The value of the property above specified shall be ascertained and determined by the assessment-roll of the city, village or town in which it is situated, completed last before the local authorities shall have given their consent, except property owned by such city, village or town, or by the state of New York, or the United States of America, the value of which shall be ascertained and determined by making the value thereof to be the same as is shown by such assessment-roll to be the value of the equivalent in size and frontage of the adjacent property on the same street or highway; and the consent of the local authorities shall operate as the consent of such city, village or town as the owners of such property. Whenever heretofore or hereafter a railroad has been or shall be constructed and put in operation for one year or the motive power thereon has been or shall be changed and put in operation for a similar length of time, such facts shall be presumptive evidence that the requisite consents of local authorities, property-owners and other authority to the construction, maintenance and operation of such railroad or change of motive power have been duly obtained. No consent of local authorities heretofore given shall be deemed invalid because of any portion of the road or route consented to not being connected with an existing road or route of the corporation obtaining or acquiring such consent and all statements of extension filed under

section ninety of this article in reference to the route or part thereof described in any consent of local authorities are hereby ratified and confirmed, whether the same were filed before or after the obtaining or acquiring of such consents, provided however that nothing herein contained shall be construed to affect any portion of a street surface railroad which is now in or upon any portion of a street which is under the jurisdiction of a park department in any city containing a population of over twelve hundred thousand inhabitants." (As amended by chap. 676 of 1892, chap. 434 of 1893, § 1, chap. 723 of 1894, chap. 545 of 1895, chap. 855 of 1896, and chap. 638 of 1901.)

"**§ 92. Consent of local authorities; how procured.**—The application for the consent of the local authorities shall be in writing and before acting thereon such authorities shall give public notice thereof and of the time and place when it will first be considered, which notice shall be published daily in any city for at least fourteen days in two of its daily newspapers, if there be two, if not, in one, to be designated by the mayor, and in any village or town for at least fourteen days in a newspaper published therein, if any there shall be, and if none, then daily, in two daily newspapers if there be two, if not, one published in the city nearest such village or town. Such consent must be upon the expressed condition that the provisions of this article pertinent thereto shall be complied with, and shall be filed in the office of the clerk of the county in which such railroad is located.

Whenever the consent of a common council of a city is applied for, the first consideration, of which notice is hereby required, may be by committee of such common council. Any such notice, publication or consideration heretofore or hereafter given, made or had in substantial conformity with the requirements of this section, is and shall be sufficient notice, publication and consideration for all the purposes hereof notwithstanding any conflicting provision of any local or special act or charter." (As amended by chap. 676 of 1892, and chap. 434 of 1893, § 1.)

As to publication of notice before granting consent by the local authorities, see *Re Buffalo Traction Co.*, 25 App. Div. (N. Y.) 447, 49 N. Y. Supp. 1052; affd., 155 N. Y., Appendix, 76.

The provision for public notice does not require that the full board of aldermen should sit for the purpose of hearing; and proceedings to sell the franchise are not vitiated by the fact that the committee of the board only was present at the time and place specified by the notice. *Abraham v. Myers*, 23 N. Y. Supp. 225, 29 Abb. N. C. (N. Y.) 384. But failure to properly advertise the time and place when the application will be presented is fatal to the right of the board to entertain the application. *People, St. Nicholas Ave., etc., R. Co. v. Grant*, 50 St. Rep. (N. Y.) 465, 21 N. Y. Supp. 232.

For a case where the "adjacent" meant neighboring streets, see *Brooklyn Heights R. Co. v. Brooklyn*, 46 St. Rep. (N. Y.) 299, 18 N. Y. Supp. 876. A street rail-

road cannot dispense with the consent of the city authority to the use of cable power. *Matter of Third Ave. R. Co.*, 56 Hun (N. Y.), 537, 31 St. Rep. (N. Y.) 645, 9 N. Y. Supp. 833.

The board of aldermen of New York city need not publish its resolution consenting to the building of a street railroad. *Abraham v. Myers*, 23 N. Y. Supp. 225, 29 Abb. N. C. (N. Y.) 384. The highway commissioners of the towns, and not the trustees of the villages, are the local authorities whose consent is essential to the construction of a street railroad across a bridge located in and constructed by two towns. *Town of Wheatfields v. Tonawanda St. R. Co.*, 92 Hun (N. Y.), 460, 36 N. Y. Supp. 744, 71 St. Rep. (N. Y.) 674; *Town of Lysander v. Syracuse, etc., R. Co.*, 31 Misc. Rep. (N. Y.) 330, 65 N. Y. Supp. (99 St. Rep.) 415; *State, Lewis v. Cumberland Chosen Freeholders (N. J. Sup.)*, 28 Atl. 553.

*Watervliet Turnpike & Railroad Company* need not obtain the approval of the railroad commissioners and the consent of the owners of one-half in value of the property abutting upon the street for the use of the highway for street railroad purposes. *Hudson River Tel. Co. v. Watervliet T. & R. Co.*, 135 N. Y. 393, 32 N. E. 148, 48 St. Rep. (N. Y.) 417. Consent of local authorities and property-owners must be obtained before a street railroad company can apply to the courts to condemn the right to use the tracks of another company. *Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540, 47 N. E. 810.

Consenting to the construction of a street railroad on condition that other railroads operating a road of two miles outside the district and connecting with the proposed road may use the track of the latter, and subsequently authorizing the building of another road of a greater length so as to connect with such road, municipal authorities must be regarded as consenting that the latter road shall operate its line over the tracks of the former. *Staten Island M. R. Co. v. Staten Island El. R. Co.*, 34 App. Div. (N. Y.) 181, 54 N. Y. Supp. (88 St. Rep.) 598.

Before 1854, the common council of New York city could not authorize or license the construction of street railroads; hence, its resolution of July 30, 1851, authorizing promoters of the Eighth Avenue railroad to construct its road, and a contract given in pursuance thereof were void. The company holds its franchise under the act of 1854. *Potter v. Collis*, 156 N. Y. 16, 50 N. E. 413.

A railroad corporation, unable to procure the consent of abutting owners, but having the confirmation of the report of commissioners in favor of the construction of the road, may avail itself of chapter 649, New York Laws 1896, confirming consents of local authorities where no application has been made to the board of railroad commissioners for a certificate of necessity. *Matter of Buffalo Traction Co.*, 25 App. Div. (N. Y.) 447, 49 N. Y. Supp. (83 St. Rep.) 1052; affd., 155 N. Y. 700.

Where the road extends through several municipalities, the consent of the authorities in one, so far

as that one is concerned, is sufficient without showing the consent of the authorities in the others. *Geneva, etc., R. Co. v. N. Y. C., etc., R. Co.*, 24 App. Div. (N. Y.) 335, 48 N. Y. Supp. (82 St. Rep.) 842; affd., 163 N. Y. 228, 57 N. E. 498; revd. on other grounds. *Matter of Buffalo Traction Co.*, *supra*.

Consent of Brooklyn's common council was necessary to the construction of a switch upon its street. *Irvine v. Atlantic Ave. R. Co.*, 23 App. Div. (N. Y.) 112, 48 N. Y. Supp. (82 St. Rep.) 465.

Street railroad franchises in Greater New York city are governed by the new charter, although granted after its approval and before it went into effect. *Gusthal v. Strong*, 23 App. Div. (N. Y.) 315, 48 N. Y. Supp. (82 St. Rep.) 652. Question of the consent of municipal authorities to the construction of a street railroad does not necessarily arise on a motion to confirm the appointment of commissioners under a statute making such appointment depend upon the failure to secure the consent of the property-owners. *Re Auburn City R. Co.*, 88 Hun (N. Y.) 603, 69 St. Rep. (N. Y.) 105, 34 N. Y. Supp. 992. Consents granted to one railroad company are not available to another. *Colonial City T. Co. v. Kingston R. Co.*, 153 N. Y. 540, 47 N. E. 810.

As to notice of application for franchise under the Ohio statute, see *Aydelott v. Cincinnati (C. C.)*, 1 Ohio Dec. 523; *Smith v. Col. L. & S. Ry. Co.*, 8 Ohio N. P. (Com. Pl.) 1.

In New Jersey, *Avon-by-the-Sea Land & Imp. Co. v. Neptune City (N. J. Err. & App.)*, 32 Atl. 220;

written application for the right of way must be made, the presentation of an ordinance therefor ready to be passed is sufficient.<sup>58</sup> The grant or consent itself should be by ordinance, or resolution,<sup>59</sup> of the board, acting as such.<sup>60</sup> It should appear upon the record of proceedings of the board,<sup>60</sup>

Camden Horse R. Co. v. West Jersey Traction Co. (N. J. Sup.), id. 72; Hutchinson v. Borough of Belmar, 62 N. J. L. 450, 45 Atl. 1092; State, Moors v. Haddonfield St. Comrs., 61 N. J. L. 470, 39 Atl. 681, 10 Am. & Eng. R. Cas. (N. S.) 323; affd., 41 Atl. 946.

In California, an ordinance for the construction of a street railroad in city streets must be presented to the mayor of the city for his approval. Eisenhuth v. Ackerson, 105 Cal. 87, 38 Pac. 530.

An ordinance allowing a street railroad company to locate its line on certain streets without there having been the petition or publication of the notice thereof required by statute is a nullity. Harvey v. Aurora & G. R. Co., 186 Ill. 283, 57 N. E. 857.

Under a constitutional provision directing that the general assembly shall not authorize the construction of any street railroad in a municipality without the consent of the corporate authorities, the assembly had authority to grant corporate powers to a street car company, though the consent of the corporate authorities in the particular city in which it was to be located had not been first obtained; such grant however does not authorize the construction of a line of street railroad therein until the consent of the corporate

authorities is obtained. Brown v. Atlanta R. & P. Co. (Ga.), 39 S. E. 71.

58. Sandfleet v. Toledo, 10 Ohio C. C. 460. But if the statute gives "no power to grant" the right except on a specified petition, such a petition must be presented. North Chicago St. R. Co. v. Cheetaham, 58 Ill. App. 318.

59. The consent by the board of public works of a city that a street railway may lay and construct its tracks therein is a street regulation which must be by ordinance, where the charter empowers the common council to establish "ordinances, rules, regulations and by-laws" to regulate highways. West Jersey Traction Co. v. Shivers, 58 N. J. L. (29 Vroom) 124, 33 Atl. 55.

60. Thomas v. Inter-Co. St. Ry. Co., 5 Am. Electl. Cas. 175, 167 Pa. St. 120. A consent to the construction of a street railway upon which no action has been taken at either a regular or a special meeting of the supervisors, nor any entry thereof made on the books of the township, nor any record of the proceedings had, is not binding upon the township, though signed by the town supervisor and bearing his official title. Tamaqua, etc., Co. v. Inter-Co. St. Ry. Co., 167 Pa. St. 91, 36 W. N. C. 166, 31 Atl. 473.

and be filed in the county clerk's office.<sup>61</sup> The ordinance or consent itself, or the application therefor, must show what particular tracks are to be laid;<sup>62</sup> the consent may be given for a temporary use.<sup>63</sup> The ordinance need not contain the statutory conditions.<sup>64</sup> Municipal consent, once obtained to operate the road in a given street, cannot again be required.<sup>65</sup> A turnpike company is not a "local authority" whose consent needs to be obtained; but the highway commissioners must consent to the use of the turnpike for railroad purposes.<sup>66</sup> Having obtained the necessary consents and the approval of the railroad commissioners to construct its road a street railroad company acquires a franchise which is property, and of which it cannot be deprived by subsequent legislation without compensation.<sup>67</sup> Where the boundaries of a

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61. See N. Y. statute, *supra*, and Del., etc., Co. v. Syracuse, etc., Co., 28 Misc. Rep. (N. Y.) 456.

62. State, *Kennelly v. Jersey City* (N. J. Sup.), 26 L. R. A. 281, 30 Atl. 531. Where the application must set out the termini and general route of the proposed road, an ordinance cannot grant a right of way in general terms over all the streets mentioned and described in the charter of the company, and all other streets within the city limits thereafter to be made, established, and opened. *Knoxville v. Africa* (C. C. App. 6th C.), 77 Fed. 501, 47 U. S. App. 74, 246, 23 C. C. A. 252; *West Jersey Trac. Co. v. Camden H. R. Co.*, 53 N. J. Eq. (8 Dick.) 163, 35 Atl. 49.

63. *Daniels v. Commonwealth Ave. St. R. Co.*, 175 Mass. 518, 56 N. E. 715.

64. *General El. R. Co. v. Chicago City R. Co.*, 66 Ill. App. 362, 28 Chic. L. N. 406, 12 Nat. Corp. Rep. 750.

65. *Brooklyn Heights R. Co. v. Brooklyn*, 46 St. Rep. (N. Y.) 299, 18 N. Y. Supp. 876.

66. *Matter of Rochester El. R. Co.*, 123 N. Y. 351, 25 N. E. 381, 33 St. Rep. (N. Y.) 695; *Harrisburgh, etc., Ry. Co. v. Turnpike Co.*, 5 Am. Electl. Cas. 1, 15 Pa. Co. Ct. 389.

67. *Coney Isl. F. H. & B. R. Co. v. Kennedy*, 15 App. Div. (N. Y.) 588, 44 N. Y. Supp. (78 St. Rep.) 825; *Detroit Citizens' St. Ry. Co. v. Detroit Ry.*, 171 U. S. 48, 43 L. Ed. 67. A street railroad company having constructed and legally operating a line of railroad in a city street has sufficient property interest to maintain an application to restrain a similar company from interfering with its line

city are enlarged, that portion of it subsequently included is subject to the provision of a railroad company's charter previously granted requiring the consent of the common council for the location of the railroad track, etc.<sup>68</sup>

**§ 6. Consents of abutting property-owners.**—These may be made in the form of a petition to the local authorities; but they must, in every particular, be as the statute prescribes. No requirement can be regarded as immaterial.<sup>69</sup> If these consents relate to a single track the road cannot be constructed as, or converted into, one of a double track without further consents.<sup>70</sup> If they authorize a double track, the local authorities cannot afterward limit the railroad company to a single track.<sup>71</sup> These consents may provide that the road be constructed within a specified time, otherwise the consents to be ineffectual.<sup>72</sup> But if the time within which a street railway track must be completed in order to preserve the franchise to occupy the street be fixed by general statute it cannot be changed by these consents.<sup>73</sup> The consent of any owner may be made by a duly authorized agent,<sup>72</sup> but not by a husband, as such, for his wife,<sup>72</sup> a father for his

of tracks already laid, and from constructing a line of road over its private property without authority of law. *Atlanta Ry. & P. Co. v. Atlanta Rapid Transit Co. (Ga.)*, 39 S. E. 12.

68. *Ill. Central R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622.

69. *Merritt v. Village of Port Chester*, 71 N. Y. 309; *People, St. Nicholas Ave., etc., R. Co. v. Grant*, 21 N. Y. Supp. 232, 50 St. Rep. (N. Y.) 465; *Roberts v. Easton*, 19 Ohio St. 78; *Attorney-General v. Chicago, etc., Ry. Co.*, 121

Ill. 638; *N. Y. Cable Co. v. Mayor, 104 N. Y. 1.*

70. *Roberts v. Easton*, 19 Ohio St. 78.

71. *Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144. But see *Lake Roland Elev. R. Co. v. Baltimore (Md.)*, 20 L. R. A. 126, 54 Am. & Eng. R. Cas. 11, 7 Am. R. & Corp. Rep. 619, 26 Atl. 510.

72. *Simmons v. Toledo (Ohio C. C.)*, 1 Toledo Leg. N. 249; *Tibbets v. West & S. T. St. R. Co.*, 153 Ill. 147, 38 N. E. 664.

73. *People, Warfield v. Sutter*

daughter, guardians for their wards, an executor with power of sale for his estate, or the president of a private corporation without authority from his board of directors.<sup>74</sup> The remaindermen in possession, caring and acting for the life tenant, may sign as owner;<sup>72</sup> but a cotenant cannot consent for his proportionate number of front feet unless his cotenants also sign.<sup>75</sup> An owner may ratify a consent signed by a stranger;<sup>76</sup> and a consent informally withdrawn before being acted upon may be reinstated without the formality required for the original consent.<sup>72</sup> Where so many signatures to a petition consenting to a street railway franchise in a street are forgeries that the petition does not carry the consent of a majority of frontage of abutting owners, it is not sufficient to give a reasonable color of right to the city council to grant such a franchise.<sup>77</sup> These consents may be given to individuals, their legal representatives and assigns, and may be turned over by them to a corporation authorized by law to construct and operate a street railroad.<sup>78</sup> In New

St. R. Co., 117 Cal. 604, 49 Pac. 726.

74. Rapp v. City, etc., R. Co., 12 W. L. B. 119; Bullock v. West Chicago Rapid Transit Co. (Cook Co. C. C.), 23 Chic. Leg. N. 149. Where there are several executors of a deceased abutting owner, even if by the terms of the will they had power to consent, the signature of one alone would seem to be invalid. Merriman v. Utica Belt Line St. R. Co., 18 Misc. Rep. (N. Y.) 269, 41 N. Y. Supp. 1049; St. Michael's P. E. Ch. v. Forty-second St., etc., R. Co., 26 Misc. Rep. (N. Y.) 601.

75. Ronnebaum v. Mt. Auburn Cable R. Co. (Cin. Super. Ct.), 29

Ohio L. J. 338. But see Simmonds v. Toledo, *supra*.

76. Sommers v. Cincinnati, 8 Am. L. Rec. 612.

77. Beeson v. Chicago (C. C. N. D. Ill.), 75 Fed. 880, 12 Nat. Corp. Rep. 408, 28 Chic. Leg. N. 367.

78. G. & W. Ry. Co. v. N. Y. C. & H. R. R. Co., 163 N. Y. 228, 57 N. E. 498. In the case cited, the court said: "Another instrument signed by thirty abutters prior to the incorporation of the petitioner was also produced. In this paper the property-owners consented that two individuals named therein, *their legal representatives and assigns*, might construct a street railroad in the highway.

York consent must be obtained even for crossing the highway,<sup>79</sup> or for using the tracks of another company.<sup>80</sup> Where

After the petitioner became incorporated the two individuals named in the consents assigned them through other parties to the railroad. These consents are in form and substance sufficient unless they are inoperative by reason of the fact that they were procured by and given to the two individuals who were promoters of and interested in the construction of the road instead of the railroad itself. It is admitted that these two instruments contain the consents of the owners of the requisite amount of property on the line of the road in the town, and the only question to be considered is, whether the consents in the paper last described were invalid for the reason that they did not run directly to the railroad, but to individuals through whom they were transferred directly to the railroad. \* \* \* The reason for condemning these consents was that it would be contrary to public policy and to the spirit of the law to allow individuals to procure the consents to themselves and then, as they might, sell them to the highest bidder. We think that this is a remote danger at best, but in any event it should not be invoked to destroy consents given and acted upon without some proof that the parties who procured them contemplated their use for purely commercial purposes. When it appears that consents were neither given nor received in good faith for the purpose of facilitating the construction of a railroad, but for some other purpose, not contem-

plated by the statute, the discussion of such a question might be timely. \* \* \* It is common practice and perhaps common prudence for the projectors of a railroad to employ parties in advance to procure rights of way, consents or like privileges to be used after the incorporation. The fact that the railroad acquires such rights through an intermediary by assignment, instead of directly from the property-owners themselves, does not affect their validity."

79. *Re Syracuse & South Bay R. Co.*, 33 Misc. Rep. (N. Y.) 510. How property is to be estimated in determining whether or not the applicant has the requisite number of consents, see *Sea Beach R. Co. v. C. I. & G. El. R. Co.*, 22 App. Div. (N. Y.) 477, 47 N. Y. Supp. (81 St. Rep.) 981; *Tiedemann v. S. I. M. R. Co.*, 18 App. Div. (N. Y.) 368, 46 N. Y. Supp. (80 St. Rep.) 64; *Case v. County of Cayuga*, 88 Hun (N. Y.) 59, 34 N. Y. Supp. 595, 68 St. Rep. (N. Y.) 632; *Curvin v. Rochester R. Co.*, 78 Hun (N. Y.), 555, 61 St. Rep. 420, 29 N. Y. Supp. 521; *McDermott v. Nassau El. R. Co.*, 85 Hun (N. Y.), 422, 32 N. Y. Supp. 884, 66 St. Rep. (N. Y.) 202. See also *Smith v. East End St. R. Co.*, 87 Tenn. 626, 11 S. W. 709. In Ohio the statutory consents of abutting owners may be obtained after publication of the notice for bids, and need not be to the mode and manner of construction and operation of the railroad. *Sloane v. P. L. R. Co.*, 7 Ohio C. C. 84.

80. *Colonial City Traction Co. v.*

the charter or articles of incorporation specify that the road is to be located in several streets of the city, the consents as to each street are separate, and upon failure to obtain the requisite consents upon any one street the applicant need not make owners along the other streets, where the consents are sufficient, parties to a proceeding for the appointment of commissioners to determine whether the road should be constructed in the street where the consents are wanting.<sup>81</sup> While the franchise to use public streets for railroad purposes can vest in the corporation only after substantial compliance with all the provisions of the statute, yet a mere inadvertence in the use of words will not invalidate the grant when it is apparent upon reading all the proceedings and all the conditions of the consent, that every benefit to the public which the statute contemplates has been secured or provided for.<sup>82</sup> When the jurisdiction is acquired by the filing of the written consents required by statute, it is not exhausted by lapse of time or by ineffectual exercise of it.<sup>83</sup> Nor are the

Kingston City R. Co., 154 N. Y. 493, 48 N. E. 900, 9 Am. & Eng. R. Cas. (N. S.) 506, 153 N. Y. 540, 4 Det. Leg. N., No. 31, 47 N. E. 810. But see Ingersoll v. Nassau El. R. Co., 89 Hun (N. Y.), 213, 69 St. Rep. (N. Y.) 16, 34 N. Y. Supp. 1044, 28 Chic. Leg. N. 34; affd., 157 N. Y. 453, 43 L. R. A. 236, 52 N. E. 545, where the use of the track was by contract under the statute of 1839, with a company whose franchise was granted before the constitutional requirement as to the consent of abutting owners.

81. *Re People's R. Co.*, 112 N. Y. 578, 20 N. E. 367. And see G. & W. Ry. Co. v. N. Y. C., etc., Co.,

163 N. Y. 228, 234, 57 N. E. 498; Hutchinson v. Borough of Belmar, 62 N. J. L. 450, 45 Atl. 1092. A new grant of a portion of a street railroad failing for want of proper consent of abutting owners may be made when the necessary consents are obtained. Such new grant is not the inauguration of a new street railway enterprise requiring bids upon rates of fare and like matters. Sanfleet v. Toledo, 10 Ohio C. C. 460.

82. Beekman v. Third Ave. R. Co., 153 N. Y. 144, 162, 47 N. E. 277.

83. Currie v. Atlantic City (N. J. Sup. 1901), 48 Atl. 615, rehearing denied, 48 Atl. 1116. In the

consents a mere license, revocable at law or by the transfer of the property before the construction of the railroad; nor are they subject to the Recording Act. They vest a certain property right in the railroad company to which it is given, which cannot be afterward divided or diminished without the consent of such company.<sup>84</sup>

**§ 7. Bids for franchise.**—In several States the consent of the local authorities in certain municipalities for a street railroad within the streets can be given only on condition that the franchise be sold at auction to the bidder who will agree to give the city the largest percentage per annum on the gross receipts of the corporation operating the road, or who will agree to carry passengers at the lowest rate, and that the contract be awarded to the lowest bidder.<sup>85</sup> This con-

case cited, it was held that under a law providing for the written consent of property-owners fronting on the street, before the municipality shall grant permission for the operation of a street railroad upon such street, a consent based on the ownership of property fronting on a street over which permission is desired, is limited to such street and has no application to any street on which the property does not front. These consents are not licenses or concessions granting to the railroad company some interest in land or right in the streets, but are, in effect, votes for the adoption of a legislative scheme by which special jurisdiction over highways is conferred on the municipality, hence there cannot be an effective withdrawal of any consent after the jurisdiction has vested in the

municipality. The jurisdiction that has vested by the written consent of the owners of property on a street will not be ousted by the subsequent conveyance by an owner, of the property by virtue of ownership of which he had consented to such jurisdiction. A board of education, having no title to lands on which the school buildings stand, cannot give a valid consent to the construction of a street railroad adjacent to the property.

84. Ade v. Nassau El. R. Co., 65 App. Div. (N. Y.) 529.

85. Ohio Rev. Stats., § 2502. And see State, Crow v. West Side St. R. Co., 146 Mo. 155, 47 S. W. 959; People, San Francisco & S. J. R. Co. v. Craycroft, 111 Cal. 544, 44 Pac. 463. The New York Railroad Law (chap. 565 of 1890, art. IV; 3 Heydecker's Gen. Laws

[2d ed.], 3309-3312) in this regard reads as follows:

**"§ 93. Condition upon which consent shall be given; sale of franchise at public auction.—** The consent of the local authorities in cities containing twelve hundred and fifty thousand inhabitants or more, according to the last federal census or state enumeration, must contain the condition that the right, franchise and privilege of using any street, road, highway, avenue, park or public place shall be sold at public auction to the bidder who will agree to give the city the largest percentage per annum of the gross receipts of such corporation, with a bond or undertaking in such form and amount and with such conditions and sureties as may be required and approved by the comptroller or other chief fiscal officer of the city, for the fulfillment of such agreement and for the commencement and completion of its railroad within the time designated by law and for the performance of such additional conditions as the local authorities in their discretion may prescribe. Whenever such consent shall provide for the sale at public auction of the right to construct and operate a branch or extension of an existing railroad, such consent shall provide that but one fare shall be exacted for passage over such branch or extension and over the line of road which shall have applied therefor; and further, that if such right shall be purchased by any corporation other than the applicant, that the gross receipts from joint business shall be divided in the

proportion that the length of such extension or branch so sold shall bear to the entire length of the road whether owned or leased which shall have applied therefor and of such branch or extension, and that if such right shall be purchased by the applicant, the percentage to be paid shall be calculated on such portion of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension or branch shall bear to the entire length of its road whether owned or leased. The bidder to whom such right, franchise and privilege may be sold must be a duly incorporated railroad corporation of this state, organized to construct, maintain and operate a street railroad in the city for which such consent may be given; but no such corporation shall be entitled to bid at such sale unless at least five days prior to the day fixed for such sale, or five days prior to the day to which such sale shall have been duly adjourned, the corporation shall have filed with the comptroller or other chief fiscal officer of the city, a bond in writing and under seal, with sufficient sureties, to be approved by such comptroller or officer, conditioned that if such right, franchise and privilege shall be sold to such corporation, to pay to the city where such railroad is situated the sum of fifty thousand dollars as liquidated damages and not by way of penalty in the event of the failure of such bidder to fulfill the terms of sale, comply with the provisions of this article pertinent thereto,

and complete and operate its railroad according to the plan or plans and upon the route or routes fixed for its construction within the time hereinafter designated for the construction and completion of its railroad, and also conditioned to pay to the corporation first applying for the consent, if it shall not be the successful bidder, the necessary expenses incurred by such corporation prior to the sale pursuant to the requirements and direction of the local authorities, within twenty days after such sale and upon the certificate of the comptroller or other officer conducting the same as to the sum or amount to be paid. Notice of the time and place and terms of sale, and of the route or routes to be sold, and of the conditions upon which the consent of the local authorities to the construction, operation and extension of such street railroad will be given, must be published by such authorities for at least three successive weeks, and in any city having two or more daily newspapers, at least three times a week in two of such papers to be designated by the mayor, and in any city where two daily newspapers are not published, at least once a week in a newspaper published therein to be designated by the mayor. The comptroller or other chief fiscal officer of the city shall attend and conduct such sale and may adjourn the same, but not more than four weeks in all, unless further adjournments should, in his discretion, be necessary by reason of the pendency of legal proceedings, and shall cancel any bid if in excess of the gross re-

ceipts, leaving in force the highest bid not in excess if the bidder shall not have furnished adequate security entitling such bidder to bid, or shall otherwise fail to comply with the terms and conditions of sale, and shall resell the consent and license in the same manner as hereinbefore provided for the first sale. The bidder who may build and operate such railroad shall at all times keep accurate books of account of the business and earnings of such railroad, which books shall at all times be subject to the inspection of the local authorities. In the event of the failure or refusal of the corporation operating or using such railroad to pay the rental or percentages of gross earnings agreed upon, and after notice of not less than sixty days to pay the same, the local authorities interested therein may apply to any court having jurisdiction upon at least twenty days' notice to such corporation, and after it shall have had an opportunity to be heard in its defense, for judgment declaring the consent and right to operate and use such railroad forfeited and authorizing the sale again of the same in the manner hereinbefore prescribed, provided, however, that no such resale of any such consent and right heretofore granted shall be authorized except upon the condition that the same shall be subject to all liens and incumbrances existing on said railroads at the time such forfeiture may have been declared. All consents hereafter given by the local authorities, unless it be otherwise provided in such consent or in some renewal thereof

may be forfeited at the expiration of two years thereafter, and every consent by the local authorities of any city of the first class or of any city, town or village now embraced within the corporate limits of any city of the first class heretofore given to or acquired or owned by any street surface railroad corporation, since January first, eighteen hundred and ninety, is hereby ratified and confirmed, and shall be deemed to be in full force and effect, and shall continue until and including December thirty-first, nineteen hundred and three when it may be forfeited unless prior thereto the required consent of property-owners, or determinations by the appellate division of the supreme court, in lieu thereof, shall have been first obtained. The board of sinking fund commissioners of any city shall have power to reduce, compromise or release any obligation or liability to the mayor, aldermen and commonalty of such city under the provisions of chapter six hundred and forty-two of the laws of eighteen hundred and eighty-six, or of this chapter whenever, in the opinion of such board, such release or compromise shall be just or equitable, or for the public interest, the reason for any such release or compromise to be stated in the recorded proceedings of such board. No lease by any company organized under section two of the railroad law and owning a right, privilege or franchise of using any street, avenue, highway or public place for railroad purposes, which has heretofore been sold under the provisions of this section, hereafter made to any street sur-

face railroad company which is not subject to the payment of any percentage pursuant to this section, and which is not organized for the purpose of operating a railroad in a city of the first class, shall be valid until the leased company shall have filed in the office of the secretary of state and in the office of the clerk of the county where its certificate of incorporation is filed, its acceptance in writing and under its corporate seal of the provisions of this section as now amended; and upon such acceptance being filed, the total percentage amount thereafter to be paid annually under this section and under section ninety-five of this act, shall be at the rate of five per centum of the gross receipts derived from the operation of the roads of the lessor and lessee companies considered as one system. The lessee company, at the time of filing its acceptance aforesaid, shall also file in the same offices a bond to the people of the state, executed in duplicate by it and a surety company authorized by law to act as surety on bonds and undertakings, in the penal sum of fifty thousand dollars, and conditioned for the faithful payment annually of the total percentage aforesaid, and such bond shall be deemed to be a full compliance with the condition for a bond or undertaking required by this section to be provided for in the conditions of the consent of the local authorities and shall supersede any such bond or undertaking theretofore given. Whenever it shall be desired to unite two street surface railroad routes at some point not over one-

half mile from such respective lines or routes, and establish by the construction of such connection a new route for public travel, and the corporation or corporations owning or using such railroads shall consent to operate such connection as a part of a continuous route for one fare, and it shall appear to the local authorities that such connection cannot be operated as an independent railroad without inconvenience to the public, but that it is to the public advantage that the same should be operated as a continuous line or route with existing railroads, or whenever for the purpose of connecting with any ferry or railroad depot, it shall be desired to construct an extension or branch not more than one-half mile in length, of any street surface railroad corporation, no sale of such franchise shall be made as provided in this section, but any consent of the local authorities for the construction and operation of such connection, extension or branch shall provide that the corporation or corporations operating such connection, extension or branch shall pay into the treasury of said city annually the percentage provided for extensions or branches in section ninety-five of this chapter, for the purposes, at the times, in the manner and upon the conditions set forth in such section. The provisions of this section as now amended shall apply to all cities of the first class, but nothing herein contained shall be construed as superseding, repealing or modifying any provision of the charter of any city, village or town, nor as modifying or affecting the

terms of a certain contract bearing date January first, eighteen hundred and ninety-two, entered into by and between the city of Buffalo and the various street surface railroad corporations therein named in such contract, except that the provisions of this act as amended, which continue and confirm the consents of local authorities shall apply to street surface railroads in the city of Buffalo, as well as in other cities of the first class. This section shall not modify or affect any contract heretofore entered into between a street surface railroad corporation and any city of the third class, town or village, regulating the payment of percentages or paving of streets, and any city of the third class, town or village, is hereby authorized to enter into any such form of contract with any street surface railroad corporation, and any such contract heretofore entered into is hereby ratified and confirmed. The local authorities may, in their discretion, make their consent to depend upon any further conditions respecting other or further security, or deposit, suitable to secure the construction, completion and operation of the railroad within any time not exceeding the period prescribed in this article and respecting the character, quality or motive power of the road to be completed and respecting the grouping of streets, avenues and highways into one route, or into several routes, for the purpose of a single sale of the franchise, right or privilege for all the routes collectively, or of the separate sale for each route or street, as said

dition can in nowise be modified, and the consent must inure to the best bidder.<sup>86</sup> In New York the statute limits the

local authorities may think expedient and respecting the payment of the percentage agreed to be paid at the sale upon all the lines operated by the successful bidder within the city and respecting any matter involved in or affecting the computation of percentage payments and respecting the use of the railroads to be constructed under the consent by any other company and respecting the interchange of traffic and division of fares between the company operating such railroads and any other company, and respecting the application of any provision herein contained as to carriage of passengers for single fare and the division of gross receipts and the payment of percentages to the line leased or operated under contract by the applicant for an extension, and also respecting any other matter concerning which, in their judgment, further conditions would be for the public interest. Any and all consents, sales and proceedings heretofore granted, made or taken in substantial compliance with the provisions of this section, as now last amended, are hereby approved, ratified and confirmed, and any purchaser or successor to or transferee of the rights of the purchaser of any right or privilege heretofore sold substantially in accordance with the provisions of this section as now amended, is authorized to acquire the requisite consents of property-owners, or, in lieu thereof, determinations by the appellate division

of the supreme court, and to proceed with the construction of its road, at any time within three years thereafter." (As amended by chap. 306 of 1892, chap. 676 of 1892, chap. 434 of 1893, and chap. 494 of 1901.)

Before the charter of Greater New York there was no provision requiring the city of Brooklyn to sell a street railway franchise to the highest bidder. Adamson v. Nassau El. R. Co., 89 Hun (N. Y.), 261, 68 St. Rep. (N. Y.) 851, 34 N. Y. Supp. 1073.

86. State v. Bell, 34 Ohio St. 194; Knorr v. Miller, 5 Ohio C. C. 609, 25 W. L. B. 128; Mathers v. Cincinnati, 3 id. 551. A franchise required by statute to be disposed of to the highest bidder is invalid when advertised and sold to the highest bidder "in square yards of gravel pavement." Buckner v. Hart (C. C. E. D. La.), 4 Am. Electl. Cas. 21, 32 Fed. 835; affd., Hart v. Buckner (C. C. App. 5th C.), 54 Fed. 925, 2 U. S. App. 488. The city of New Orleans may grant a right of way to a railroad company whose object is to carry freight on its cars beyond the city limits to a station where they will reach its own roadbed without complying with the provisions of a statute prohibiting the common council from granting, selling, or disposing of any "street railroad franchise" except after three months publication of the terms and specifications of such franchise and its adjudication to the highest bidder. New Or-

bidders at any sale of a franchise at auction to railroad corporations authorized to construct and operate a street railroad in the city.<sup>87</sup> A bid cannot be rejected as not made in good faith when it is made with the intention of complying with the terms of the sale in case the bid is accepted.<sup>88</sup> Nor can it be rejected as not made in good faith upon anything not said and done by the bidder in the presence of the board awarding the contract at the time of an inquiry made by it as to the question of good faith; and, in Ohio, such inquiry must be confined to the question, "Does the bidder withdraw his bid, or does he intend to comply with its terms in case it is accepted?"<sup>89</sup> But the purpose of this and kindred statutes is to secure the most efficient service on the best possible terms to the public, and the officers controlling the sale, acting in good faith, have a large discretion as to the time and manner of receiving and rejecting bids and as to the security to be furnished by bidders which the court will not control.<sup>90</sup> The insertion in the bid of the words "for himself and associates," after the words "the undersigned

leans, etc., R. Co. v. Watkins, 48 La. Ann. 1550, 21 So. 199.

87. Beekman v. Third Ave. R. Co., 153 N. Y. 144, 153, 47 N. E. 277.

88. Gallagher v. Johnson (Com. Pl.), 30 Ohio L. J. 139. While the municipal authorities may impose any proper condition upon which their consent will be given, the conditions so imposed must be specified in the notice of sale, and no other conditions can be inserted in the consent, or exacted or imposed upon the successful bidder than those required by the act and by the notice of sale; but

the conditions imposed by the municipality must not in any wise contravene the statutory conditions. People ex rel. W. S. St. R. Co. v. Barnard, 110 N. Y. 548, 18 N. E. 354; Beekman v. Third Ave., etc., Co., 153 N. Y. 144, 47 N. E. 277.

89. Johnson v. West Side St. Ry. Co., 10 W. L. B. 345; Knorr v. Miller, 5 Ohio C. C. 609, 25 W. L. B. 128; Simmons v. Toledo, 5 Ohio C. C. 124, 1 Toledo Leg. N. 249; Beekman v. Third Ave., etc., R. Co., 153 N. Y. 144, 161, 47 N. E. 277; Sloane v. People's El. R. Co., 7 Ohio C. C. 84.

hereby proposes " does not make the bid that of any person other than the one signing it, nor require his bond to be executed by other persons, or that the condition of the bond provide that other persons enter into the contract.<sup>88</sup> An action cannot be maintained in a court of equity in which a municipal corporation seeks a determination, in respect to an auction sale of a street railroad franchise, whether the bidding has passed beyond all reasonable and valid bids, and which is the highest legal and valid bid, and to have the city comptroller directed to award the franchise accordingly, or to have it determined whether the bids should be canceled and a new sale ordered.<sup>89</sup> A bidder for a franchise, under the New York statute, who withdraws after bidding a certain percentage of gross receipts cannot restrain the sale of the franchise to another bidder on the ground that its bid was excessive and not made in good faith, even although its own bid was to the full amount of the gross receipts and any bid in excess thereof was void.<sup>90</sup> A contract by two active competitors for a street railway franchise, by which all competition is withdrawn and agreement is made to co-operate in securing the franchise and divide the profits of the enterprise and thus prevent all competition and avoid the imposition of onerous conditions by municipal authorities is void as against public policy.<sup>91</sup> But the sale of the franchise is not illegal, because it happens that one purchaser, without his connivance or procurement, and without fraud, collusion, or undue influence being shown, is in a position,

90. Mayor v. Fitch, 9 App. Div. (N. Y.) 452.

91. So. Boul. R. Co. v. North N. Y. City Trac. Co., 16 Misc. Rep. (N. Y.) 263.

92. Hyer v. Richmond Trac. Co.

(C. C. App. 4th C.), 42 U. S. App. 522, 8 Fed. 839; Baird v. Sheehan, 38 App. Div. (N. Y.) 7; Atcheson v. Mallon, 43 N. Y. 147; Goodrich v. Houghton, 134 id. 115, 31 N. E. 516.

by reason of his situation, to bid a price higher than another.<sup>93</sup>

**§ 8. Extensions.**—Under the New York statute, cited in notes to preceding sections in this chapter, what is called a branch or extension of an existing railroad may be constructed and operated under a franchise applied for by one railroad, and, when put in operation, the branch or extension shall, for certain purposes, be deemed to be a part of the road making the application, even though the franchise to construct the branch shall be acquired and the new road operated by another corporation. Whoever may acquire the franchise at the competitive bidding, and whoever may own and operate the branch or extension, it must still bear certain relations to the parent road that inaugurated the proceedings for its construction, and at least one of these relations is the right of the public to a continuous passage over both the main line and the new branch on payment of a single fare.<sup>94</sup> The words "extend" and "extension" are not intended to be used in the statute in their restricted sense of prolongation in a given direction, but rather to enable the railroad company to acquire the right of construction, maintenance, and operation of additional roads which might be operated in connection with its existing lines in any direction or upon any street or avenue.<sup>95</sup> But

93. Johnson v. City of New Orleans (La. 1901), 29 So. 355.

94. Beekman v. Third Ave. R. Co., 153 N. Y. 144, 154, 47 N. E. 277. When a municipality has attached to its grant to a street railroad company of a right of way over its streets a condition that the tracks might be used by any other railroad to which the same

should afterward be given, a company to which the right of way is subsequently given may lawfully adopt an extension of its road which will include the tracks of the other company. Hannum v. Media, etc., Co. (Pa. C. P.), 8 Del. Co. Rep. 91.

95. Bohmer v. Haffen, 35 App. Div. (N. Y.) 381, 388, 54 N. Y.

several branches or extensions cannot be grouped together into one sale of the franchise, since the general purpose of the statute would be thereby defeated, and the common council enabled, in most cases, practically to select the purchaser of the right.<sup>96</sup> The fact that the applying corporation consents that the right to use part of its main line to connect the several branches or extensions may also be sold, and the terms of the sale so proposed, does not make the several branches a single extension.<sup>9</sup> In the sale of the franchise the common council cannot add as a condition that the purchaser must pay a gross sum in cash into the State treasury in addition to the percentage of gross receipts bid, as required by the statute.<sup>96</sup> The consent of the abutting owners

Supp. (88 St. Rep.) 1030; affd., 161 N. Y. 390. And see *West Jersey Trac. Co. v. Camden H. R. Co.*, 52 N. J. Eq. (7 Dick.) 452, 29 Atl. 333, 1 Am. & Eng. R. Cas. (N. S.) 132; 53 N. J. Eq. (8 Dick.) 163, 35 Atl. 49. In the case last cited it was held that a provision allowing a railroad company to extend its railroad along "any public road or highway extending from" a specified city, did not authorize the company to build on a highway no part of which touched the city, although it was crossed by highways leading from the city; nor could it deviate from its charter route. And see *Citizens' St. R. Co. v. Africa*, 100 Tenn. 26, 42 S. W. 485; *S. Boston R. Co. v. Middlesex R. Co.*, 121 Mass. 485; *Cincinnati v. Cincinnati St. R. Co.* (Cin. Super. Ct.), 31 Ohio L. J. 308. A street railroad franchise provided for the construction of an extension of the R. railway to connect with the D. railway (the

connection to be made within two years). *Held*, that such connection was contemplated as would allow the cars of the R. railway to pass over the tracks of the D. railway. *Township of Hamtranck v. Rapid Ry. Co.* (Mich.), 81 N. W. 337.

96. *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, 154, 47 N. E. 277. In the case cited the court said: "The next question involves the power of the local authorities to accept the proposition of the defendant to pay into the city treasury, in addition to the percentage of gross receipts prescribed by the statute, a lump sum of \$250,000, and to make the payment of that sum a condition of the consent and sale in case the defendant became the purchaser. It is conceded that the defendant was so situated with reference to these proposed branches or extensions of its system, that it could afford to pay for the right to construct and operate them a larger

is essential to the validity of a franchise for an extension, unless the extension is really necessary to the enjoyment of a valid grant made before the constitutional or statutory provisions requiring such consents.<sup>97</sup> But the consent of the

sum of money than any other corporation competing with it for the right. But the question is how far such pecuniary considerations can be permitted to enter into the execution of a trust or agency confided by the statute to the local authorities for the benefit of the public. The defendant's ability to pay could find a fair field in bidding up the percentage on gross receipts, but whether it could tempt the local authorities by an offer of a large sum of money to be paid at once into the treasury is quite another question. If the common council could make the payment of such a sum by the defendant a condition of its consent, it could make it a condition in all cases, and if it could exact the payment of that sum there can be no limit placed upon its power in that regard. The disposition of public franchises would then depend upon the ability of the purchaser to pay, and the party offering the largest sum of money to be paid down would be enabled to shape the route and secure the franchise. This might bring money to the treasury and advantage to the corporation thus paying for the franchise, but at the same time the public convenience and the public interests might have been overlooked, and in many cases probably would be. It is quite clear that there is no authority in the statute for the sale of a franchise

for a gross sum of money." (Pages 157, 158.)

Under Conn. Pub. Acts 1893, p. 308, it was held that a condition of the approval by the mayor and common council of a plan for an extension of street railroad tracks for a written acceptance of the "permit" and all its provisions, is unauthorized where some of the provisions of the permit were themselves unauthorized. Central R. & E. Co.'s Appeal, 67 Conn. 197, 35 Atl. 32.

97. Mt. Auburn Cable Co. v. Neare, 54 Ohio St. 153, 35 Ohio L. J. 61, 42 N. E. 768; People v. Third Ave. R. Co., 45 Barb. (N. Y.) 63; Harner v. Columbus Street Car R. Co. (C. P.), 29 Ohio L. J. 387.

In New York a statute provides for the saving of corporate rights in case of failure to complete road, and for extensions, as follows:

"§ 106. Corporate rights saved in case of failure to complete road; right to operate branches; conditions; former consents ratified; limitations.—The corporate existence of and powers of every street surface railroad corporation, which has completed a railroad upon the greater portion of the route designated in its certificate of incorporation, within ten years from the date of filing such certificate in the office of the secretary of state, and which has operated such completed

portion of its railroad continuously for a period of five years last past, and is now operating the same, shall continue with like force and effect, as though it had in all respects complied with the provisions of law with reference to the time when it should have fully completed its road. Every such corporation shall have the right to operate any extensions and branches of its railroad, now constructed and operated by it, for a period of ten years last past, with like force and effect, as though the route of such extensions and branches were designated in its certificate of incorporation. But every such street railroad corporation is authorized to operate such railroad and any extensions or branches thereof, upon condition that it has heretofore, or shall hereafter, obtain the consent of the local authorities having the control of that portion of the streets, avenues or highways included in such railroad, or any extension or branches thereof, to the construction and operation of the same, and also upon the condition that it has heretofore or shall hereafter first obtain the consent of the owners of one-half in value of the property bounded on the portion of the streets, avenues or highways included in the route of such railroad, or any extensions or branches thereof, to the construction and operation of the same, or in case the consent of such property-owners cannot be obtained, the appellate division of the supreme court of the department in which such railroad or any extension or branch thereof is located, may, upon application,

appoint three commissioners who shall determine, after a hearing of all the parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property-owners. If any street surface railroad corporation shall have made and filed a statement or statements of proposed extensions or branches embracing a line from the boundary of a city or village to the boundary of another city or village generally parallel with the route specified in its certificate of incorporation and generally distant not more than one-half mile therefrom, and shall have made and filed an agreement of consolidation with some other street surface railroad corporation formed to build a street railroad upon a route continuous or connecting with one or more of the routes described in such statement or statements of proposed extensions or branches, and thereafter there shall have been constructed and operated for a period of four years a street surface railroad from such city or village to such other city or village upon a line embraced in any such proposed extensions or branches, such consolidated corporation may relinquish and abandon any unconstructed route or unconstructed portions of route specified in the certificate of incorporation or in any statements of proposed extensions or branches of such first mentioned corporation by filing in the office of the secretary of state a copy of a resolution of the board of directors of such consolidated cor-

abutting owners along the main line of the railroad applying for the right to extend is not necessary.<sup>98</sup> Where the extension is not necessary to the enjoyment of a franchise previously granted, then it is subservient to every condition and restriction imposed by statute or ordinance at the time it is proposed.<sup>99</sup> But the consent of the local authorities to the proposed extension cannot be compelled by mandamus or otherwise.<sup>1</sup> Authority given in the charter of a company to construct "such branches as may be necessary to connect

poration certified by its president and secretary, declaring such unconstructed route or unconstructed portions of route relinquished and abandoned, and thereupon the corporation rights, powers and franchises of such consolidated corporation shall be and continue the same as though the certificate of incorporation of such constituent corporation had specified the constructed and not the unconstructed portion of such route and proposed extensions and branches. All consents heretofore given, or grants made by local authorities having the control of the portion of any street, avenue or highway included in the route of such railroad, or any extensions or branches thereof, to any such street surface railroad corporation, are hereby ratified and confirmed and declared valid. This section shall be applicable to any corporation whose lines are wholly within any towns, cities or villages having less than twenty thousand inhabitants.

"This section shall not apply to or affect any railroad corporation in the city of New York; nor any special grant made to or au-

thority conferred upon any street surface railroad corporation by any law of this state; nor any pending litigation; nor shall it impair existing rights, privileges or franchises of any street surface railroad corporation. (As amended by chap. 676 of 1892, and chap. 198 of 1900.)" 3 Heydecker's Genl. Laws (2d ed.), 3321.

98. Broadway & N. St. R. Co. v. Brooklyn St. Ry. Co., 10 W. L. B. 72.

99. City of St. Louis v. Mo. R. Co., 13 Mo. App. 524; Central Crosstown R. Co. v. Met. St. Ry. Co., 17 Misc. Rep. (N. Y.) 716. If the charter of a street railroad company requires the consent of the city council to the extension of its road, and a supplement thereto authorizes the extension without such consent, a second supplement silent as to the consent is subject to the charter requirement that the consent be obtained. Philadelphia v. Citizens' Pass. R. Co. (Com. Pl.), 48 Phila. Leg. Int. 220, 10 Pa. Co. Ct. 16.

1. Silsby v. Lyle, 117 Mich. 327, 75 N. W. 886; People ex rel. W. S. St. R. Co. v. Barnard, 110 N. Y. 548, 18 N. E. 354.

them with any other railway or railways within the city" is to be confined in its operation to railways in existence at the time the charter was granted.<sup>2</sup> Statutory and other requisites to the granting of an application for leave to construct a street railway do not necessarily apply to an application for an extension thereof.<sup>3</sup> An extension must be of the same legal nature as that which is extended. Therefore, municipal authorities have no power to extend the tracks of a corporation organized as a steam railroad company over the streets of a city, the extension to be operated by horse power.<sup>4</sup> A municipal ordinance granting authority to a street railroad to extend its track is not an act conferring corporate power within the constitutional provision against special acts conferring corporate powers.<sup>5</sup> And where extensions are authorized over new streets not yet fully laid out and opened there is no necessity for a separate ordinance for each new street to be occupied as such new street is established.<sup>6</sup> No formal resolution of acceptance of a franchise for a street railroad extension is necessary in any case if the facts show an actual, practical acceptance by the company, or action which would be only explicable in case the franchise were

2. People's Pass. Ry. Co. v. Marshall St. Pass. Ry. Co., 8 Pa. Co. Ct. 273.

3. State v. Cin. & H., etc., Ry. Co., 19 Ohio C. C. 79, 10 O. C. D. 418; Mayor v. Eighth Ave. R. Co., 7 App. Div. (N. Y.) 85; Mayor v. N. Y. & H. R. Co., 46 St. Rep. (N. Y.) 349; affd., 139 N. Y. 643, 35 N. E. 206. In New Jersey the right of a street railroad company to construct an extension depends upon the grant of municipal authority and on the filing by the company of an acceptance of the

grant with its restrictions, if any, in the office of the secretary of state, and delivery of a copy thereof to the clerk of the municipality. Trenton St. Ry. Co. v. Pa. R. Co. (N. J.), 49 Atl. 481.

4. Cincinnati Inc. P. R. Co. v. Cincinnati, 52 Ohio St. 609, 44 N. E. 327. And see S. C., 30 Ohio L. J. 321.

5. Simms v. Brooklyn St. R. Co., 37 Ohio St. 556.

6. Africa v. Knoxville (C. C. E. D. Tenn.), 70 Fed. 729.

accepted;<sup>7</sup> but before consents can be received the applying corporation must locate the road along which the extension is proposed to be made.<sup>8</sup> The right to extend, conferred by a street railroad charter, is not abandoned by nonuse for twenty years, where the charter contains no time limitation, and there is no public necessity for an earlier extension.<sup>9</sup> Municipal authorities may grant an extension of seven years upon a street railroad franchise where it has authority to impose a limit of thirty years upon its consent.<sup>10</sup> In a recent case, decided in the New Jersey Court of Errors and Appeals, it is held that the right of street railway companies, incorporated under the act providing for the incorporation of street railway companies, to construct an extension of its railway depends (1) upon municipal action granting it authority to do so, with such restrictions as the municipal body may deem proper; and (2) the filing by the company of its acceptance of the grant, with its restrictions, in the office of the secretary of state, and the delivery of a copy thereof to the clerk of the municipality. Also that the statutory pro-

7. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114.

8. *McClean v. Westchester El. Ry. Co.*, 25 Misc. Rep. (N. Y.) 383, 55 N. Y. Supp. 556. An application for a street railroad franchise may designate a portion of the proposed route in the alternative, and the grant by the municipality is not necessarily invalid because it covers only a part of the proposed route, or designates the grantees as "trustee." *Simmons v. Toledo*, 5 Ohio C. C. 524.

9. *West Jersey Trac. Co. v. Camden H. R. Co.* (N. J. Ch.), 29 Atl. 333.

10. *Citizens' St. R. Co. v. City R. Co.* (C. C. D. Ind.), 64 Fed. 647; affd., 166 U. S. 557, 41 L. Ed. 1114. A statute which permits a street railroad company to extend its tracks through certain streets to be opened, providing its road be built within a limited time or as soon as the street shall be opened, must be construed to mean that the road cannot postpone the entire work until the completion of the unfinished streets. *People v. Broadway R. Co. of Brooklyn*, 126 N. Y. 29, 26 Abb. N. C. (N. Y.) 407, 26 N. E. 961, 36 St. Rep. (N. Y.) 376.

vision cited empowers the municipality to grant to a street railway company the right to extend its railway from its legally authorized terminus, but that it does not justify a grant to construct an addition to an extension which has been built without legal warrant.<sup>11</sup>

**§ 9. Proceedings if property-owners do not consent.**—In New York, if the requisite abutting property-owners upon a street through which the street railroad company desires to construct or extend a street railroad do not consent thereto, application may be made to the Appellate Division of the Supreme Court for the appointment of three commissioners to determine whether such railroad ought to be constructed and operated.<sup>12</sup> Indeed, there is nothing to prevent several

11. Trenton St. Ry. Co. v. Penn. R. Co., 24 N. J. L. J. 595. The eighth section of the act (passed April 6, 1886, as amended March 27, 1889, 3 Gen. Stat. 3220) provides that "the board of aldermen, common council, or township committee, upon the petition of the board of directors of any company incorporated under this act, or a majority thereof, for a location of the tracks of its railway therein, conformably to the route designated in their articles of incorporation, or for the extension of the same, shall give notice to all parties interested (in a specified manner) of the time and place at which they will consider such application for location; and, after hearing, they shall pass an ordinance refusing such location or extension, or granting the same or any portion thereof, under such lawful restrictions as they may deem the interests of the public

require; and the location or extension, thus granted, shall be deemed and taken to be the true location or extension of the tracks of the railway, if an acceptance thereof in writing, by the directors, shall be filed with the secretary of state within thirty days after receiving the notice, and a copy thereof delivered to the clerk or other equivalent officer of the municipality or township."

12. The statute (art. IV, chap. 565 of 1900. The Railroad Law, 3 Heydecker's Gen. Laws, 3313) reads as follows:

"**§ 94. Proceedings if property-owners do not consent.**—If the consent of property-owners required by any provision of this article cannot be obtained, the corporation failing to obtain such consents may apply to any general term of the supreme court held in the department in which it is proposed to construct its road

applications in regard to particular streets named in the petition, provided such streets are also named in the articles of association, or application for extension, as being streets through which it is proposed to construct, extend, maintain, and operate the railroad. If the proceeding be taken in regard to but one street, or any number of streets less than the total contained in the articles of association, those only

for the appointment of three commissioners to determine whether such railroad ought to be constructed and operated. Notice of such application must, at least ten days prior thereto, be served, personally, upon each nonconsenting property-owner by delivering the same to the person to whom such property is assessed upon such assessment-roll or by duly mailing the same, properly folded and directed, to such property-owner at his post-office address with the postage prepaid thereon. If the person upon whom service is to be made is unknown, or his residence and post-office address are unknown and cannot by reasonable diligence be ascertained, service of such notice may be made by publishing the same in such newspaper of the county as the court may direct, at least once a week for two successive weeks. Upon due proof of service of such notice the court to which the application is made shall appoint three disinterested persons, who shall act as commissioners, and who shall, within ten days after their appointment, cause public notice to be given of their first meeting in the manner directed by the court and may adjourn from

time to time, until all their business is completed. Vacancies may be filled by the court after such notice to parties interested as it may deem proper to be given; and the evidence taken before as well as after the happening of the vacancy shall be deemed to be properly before such commissioners. After a public hearing of all parties interested, the commissioners shall determine whether such railroad ought to be constructed and operated, and shall make a report thereon, together with the evidence taken, to the general term, within sixty days after appointment, unless the court, or a judge thereof, for good cause shown, shall extend such time; and their determination that such road ought to be constructed and operated, confirmed by such court, shall be taken in lieu of the consent of the property-owners hereinbefore required. The commissioners shall each receive ten dollars for each day spent in the performance of their duties and their necessary expenses and disbursements, which shall be paid by the corporation applying for their appointment. (As amended by chap. 676 of 1892.)"

who are interested in property along the streets in regard to which the petition is presented, are proper parties. And no determination made by the commissioners appointed in the proceeding can bind or in any manner affect property-owners along other streets not mentioned in the petition; and if subsequent proceedings should be taken for the appointment of commissioners to determine as to the construction of the road through their streets, such owners would have the right to oppose the granting of the petition or the making of the determination by the commissioners, wholly irrespective of any previous determination made by other commissioners in other proceedings in relation to other streets.<sup>13</sup> The application should properly be made on petition modeled somewhat after the form prescribed in condemnation proceedings, although affidavits containing the requisite averments may suffice. The papers upon which application is made must show that the applicant is a street railroad corporation incorporated under the laws of that State, and must contain averments showing compliance with every statutory or other precedent requisite.<sup>14</sup> It will not do to state generally that some of the owners decline to consent, and that consents of others cannot be obtained by reason of their absence, and that application had been made therefor diligently and in good faith.<sup>15</sup> The papers must show just what has been done with reference to obtaining the consents, the names and the amount of the holdings of the persons to whom application to consent had been made, and their refusal, and the total amount of the property owned

13. *Matter of People's R. Co., 112 N. Y. 578, 582, 20 N. E. 367.*

14. *Re Brooklyn City R. Co., 26 App. Div. (N. Y.) 627.*

15. *Matter of Broadway Und. Ry. Co., 23 Hun (N. Y.), 693; Matter of Broadway Surface R. Co., 36 id. 644; Matter of N. Y. Cable Ry. Co., id. 355.*

on the street on which the road is proposed to be constructed, so that the court may see and determine from the averments that the requisite consents of abutting owners cannot be obtained.<sup>13</sup> A proceeding to procure the favorable report of commissioners appointed by this court is entirely independent of a proceeding to procure the consent of the local authorities, or of the board of railroad commissioners; and hence it is no defense to a motion to confirm the report of commissioners so appointed that the other consents will have to be obtained before the road can be actually constructed.<sup>16</sup> The determination of the commissioners is not final or self-operative. It must be confirmed by the Appellate Division of the Supreme Court, which has the power and the duty, as a tribunal of original jurisdiction, to review the whole case and to pass upon the sufficiency of the facts and circumstances to warrant the determination of the commissioners that there ought to be a street railroad in any municipality where there were not in favor of it one-half of the property-owners to be affected.<sup>17</sup> This court has power to confirm a report duly made by a majority of the commissioners appointed; and while it may and should determine for itself whether the facts disclosed to the commissioners are sufficient to justify the granting of the petition,<sup>18</sup> it cannot, in the face of an adverse report, determine that the railroad should be constructed and operated.<sup>19</sup> In fact, the Appellate Division cannot act except to confirm or refuse to confirm a favorable report, unless the adverse report is im-

13. See note 13 on page 99.

16. *Re Buffalo Traction Co.*, 25 App. Div. (N. Y.) 447; affd., 155 N. Y. 700; *Colonial City T. Co. v. Kingston R. Co.*, 154 id. 493, 48 N. E. 900.

17. *Re Kings Co. El. R. Co.*,

82 N. Y. 95, 102; *Re Port Chester St. Ry. Co.*, 43 App. Div. (N. Y.) 536; *Re N. Y. Cable Ry. Co.*, 40 Hun (N. Y.), 1.

18. *Re Port Chester St. Ry. Co.*, 43 App. Div. (N. Y.) 538.

19. Const., art. III, § 18.

peached for fraud or such irregularity as would deprive the petitioner of a statutory or vested right.<sup>20</sup> The power of the court to appoint implies power to supervise the conduct of the persons appointed, at least to the extent of seeing whether they disobeyed the statute which called them into existence, or acted corruptly, or failed to comply with the order appointing them by publishing and serving the notices specified therein. The commissioners are not appointees of the legislature, but of the court pursuant to the provisions of the Constitution, to decide a certain question "after a hearing of all parties interested." They are not a distinct tribunal, for they are appointed by the court and report to the court. If they refuse to hear the parties in interest the court can set aside their determination and appoint new commissioners to do what the law requires, in the manner specified, after due notice and an opportunity to be heard. While not bound to strict compliance with common-law evidence, or to any particular method of procedure, except as specified by statute, their action is judicial in character and must, to a reasonable extent, conform to judicial methods, for by command of the Constitution a "hearing" is to be had and a "determination" made. A substantial departure from what is fairly to be implied from the use of the words "hearing" and "determination" in the fundamental law authorizes the court which appointed the commissioners to set aside their action and proceed anew. If, for instance, they state in their report that their only reason for deciding that the road ought not to be built was some fact, utterly immaterial, or if they show conclusively that they exercised powers they did not possess, or failed to exercise the powers they

20. *Re Nassau Cable Co.*, 36 Hun (N. Y.), 272.

did possess, because they thought the law withheld them, it is clear that their decision would not be a determination within the intent of the law. If, through misconduct, palpable error, or accident they fail to make such a report as the law contemplates, it is the duty of the Appellate Division, upon proper application, to set their report aside and appoint other commissioners, or remit the matter to the same commissioners with proper instructions. Unless the appointees of the court keep within the law, as well as its own order, it necessarily has power to interfere, not by way of review as upon appeal or certiorari, but in the exercise of original jurisdiction flowing from the power to appoint, as otherwise the object of the appointment would be defeated by the misconduct of the commissioners.<sup>21</sup>

**§ 10. Proceeding without consent; how prevented.**—Without the statutory consents the street railroad company has no right to commence the construction of its road in the street as to which the consents are withheld; and any abutting property-owner in that street, owning to the center thereof, can maintain an equitable action to restrain such construction, and need not prove special damage;<sup>22</sup> but where his

21. *Matter of Nassau El. R. Co.*, 167 N. Y. 37-40, revg. 6 App. Div. (N. Y.) 141.

22. *McClean v. The Westchester El. Ry. Co.*, 25 Misc. Rep. (N. Y.) 383; *Re Cortland, etc., R. Co.*, 31 Hun (N. Y.), 72; *Roberts v. Easton*, 19 Ohio St. 78; *Wiggins Ferry Co. v. E. St. Louis Ry. Co.*, 107 Ill. 450; *Peck v. Schenectady R. Co.*, 67 App. Div. 359. In the case last cited, it was held that where a railway company procures the consent of the necessary local author-

ties, but not of one-half the abutting owners, and thereupon obtains the appointment of commissioners to determine whether the road should be constructed, and threatens after such commissioners have reported in favor of the construction of the road and their report shall have been confirmed by the appellate division, to begin the construction of the road, an abutting owner having title to the fee of the street may have an injunction; and the court will not, against his pro-

property is bounded by the exterior line of the street and he does not own the fee of any part of the street, he is not entitled to enjoin the maintenance and operation of the railroad in the absence of proof that he has suffered special damage therefrom.<sup>23</sup> Citizens and taxpayers who are not owners of abutting property cannot maintain an action.<sup>24</sup> In Illinois, the construction of an unauthorized road may be prevented by injunction on information filed by the attorney-general.<sup>25</sup> In any case *laches* or acquiescence may be a defense to the action.<sup>26</sup> It is incumbent upon the plaintiff to prove upon the trial that the requisite consents have not been obtained.<sup>27</sup> If however a temporary injunction be granted during the pendency of the action, upon sufficient

test, assess the damages which he will sustain by reason of the construction of the road and grant an alternative judgment such as is usual in the elevated railroad cases, nor will it deny the abutting owner relief upon the railway company giving adequate security for the payment of any compensation which may be found due to him by reason of the appropriation of his land. The court said that in none of the elevated road cases where such practice obtained did it appear that the plaintiff protested against trying the question of damages before the court and taking the alternative judgment; and also, that in every case, except that of *Story v. The N. Y. Elev. R. Co.*, 90 N. Y. 122, the railroad was already in operation.

23. *Black v. Brooklyn Heights R. Co.*, 32 App. Div. (N. Y.) 468.

24. *Harrison v. Mt. Auburn Cable Ry. Co.*, 17 W. L. B. 265; *Knorr v. Miller*, 5 O. C. C. 609; *Simmons v. Toledo*, id. 124.

25. *Hunt, Attorney-General, v. Chicago, etc., Ry. Co.*, 121 Ill. 638, 13 N. E. 176. And see *People, West Side St. R. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354.

26. *Paterson, etc., Ry. Co. v. Mayer*, 24 N. J. Eq. 158; *Ferguson v. Covington & C. El. R., etc., Co. (Ky.)*, 57 S. W. 460. Although road was constructed under order of court on failure to procure sufficient consents of abutting owners, yet one who did sign consent cannot maintain action to prevent operation of road. *Heimburg v. M. Ry. Co.*, 162 N. Y. 352, 56 N. E. 899. And see *Bellew v. N. Y., W. & C. T. Co.*, 47 App. Div. (N. Y.) 447, 62 N. Y. Supp. 242; *Detwiler v. Toledo El. St. R. Co.*, 6 Ohio N. P. 485, 8 Ohio S. & C. P. Dec. 166.

27. *O'Brien v. The Buffalo Traction Co.*, 31 App. Div. (N. Y.) 632. And see *Matter of Buffalo T. Co.*, 25 App. Div. (N. Y.) 447; affd., 155 N. Y. 700.

papers, the defendant, to set it aside, being charged with the duty of obtaining these consents, must be presumed to be possessed of knowledge and of the consents which gave it the right to construct the railroad in the street and has the burden of proving its consents.<sup>28</sup> The owner of the fee however to the center of the street, who has not consented to the construction and operation of the road as required by statute, while he may bring his action to recover damages for the taking of his property, cannot restrain the railroad company from constructing and operating its road along the street, provided the statutory consents of a sufficient number of property-owners has been given.<sup>29</sup>

**§ 11. Conditions imposed with consents; rights of the grantee and the public thereunder.**—The franchise granted to the street surface railroad company and accepted by it constitutes a contract. Therefore every condition imposed by the abutting property-owners or the "local authorities," which does not nullify or modify limitations and restrictions

28. Dusenberry v. N. Y., etc., T. Co., 46 App. Div. (N. Y.) 267.

29. Adee v. Nassau El. R. Co., 65 App. Div. 529. In the case cited the complaint alleged that the requisite statutory consents had not been obtained. The railroad company answered denying this allegation and furnishing a bill of particulars showing that the necessary number of alleged consents, reciting ownership in the individuals giving them, made in the usual form and acknowledged or proved, had been recorded pursuant to the statute. It was held that the burden of proving that such consents were ineffective was upon the plaintiff, and was not

shifted by the fact that in an application made under the provisions of the Constitution and section 94 of the Railroad Law for the appointment of commissioners to determine whether the railroad should be constructed upon the street, the company had alleged that it was unable to secure the necessary consents, if it appear that since the commencement of that proceeding the railroad company had succeeded to the rights of another company which also had procured a number of consents for the construction of a street surface railroad upon the street in question.

already imposed by law in favor of the public, and which imposes upon the grantee still greater restrictions and limitations for the public advantage, must be strictly complied with. Their power to grant or withhold consent to the construction of street railroads is absolute and they may impose any conditions, however onerous or difficult to perform, which do not limit or restrict the rights of the public, as the terms upon which their consent will be given. If the terms imposed by abutting property-owners are unreasonable, the company may proceed as if their consent were refused. If however it choose to act upon such consents it must comply with the terms of its contract.<sup>30</sup> Thus rates of fare may be controlled;<sup>31</sup> the time for constructing the road may be

30. *People ex rel. W. S. St. R. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Gaedeke v. S. I. & M. R. Co.*, 43 App. Div. (N. Y.) 514, 60 N. Y. Supp. 598; *People v. Chicago W. Div. Ry. Co.*, 118 Ill. 113, 7 N. E. 116; *Loyalsock Township v. M. T. R. Co. (C. P.)*, 7 Pa. Dist. 291; *Borough of Shamoken v. S. M. C. El. Co. (Pa.)*, 46 Atl. 382; *Central R. E. Co.'s Appeal*, 67 Conn. 197, 35 Atl. 32; *Louisville Trust Co. v. Cincinnati (C. C. S. D. Ohio)*, 73 Fed. 716; *Perkiomen R. Co. v. Collegeville El. St. Ry. Co. (C. P.)*, 14 Mont. Co. L. Rep. 13.

Where an ordinance is passed granting to a company the right to use city streets for railway purposes upon conditions affecting the operation of the road, for its proper construction and requiring it to keep the streets and tracks in proper repair, the city cannot reserve the legal right to repeal such ordinance on the failure of

the company to comply with such conditions, on its own adjudication without applying to the courts. *Citizens' H. R. Co. v. Belleville*, 47 Ill. App. 388. The council of a city may refuse permission to a street railroad company to construct its road in its streets; but if it grants permission it may not do so upon the condition that the company does not exercise one of its corporate powers, and therefore a condition or regulation that the company shall not carry freight is void. *State v. Dayton Traction Co.*, 18 Ohio C. C. 490, 10 O. C. D. 212. And see *Montclair Military Academy v. New Jersey St. Ry. Co. (N. J. Sup.)*, 47 Atl. 890.

31. *Gaedeke v. S. I. & M. R. Co.*, 46 App. Div. (N. Y.) 220; S. C., 43 id. 521, 60 N. Y. Supp. 598.

Rates of fare so controlled cannot be subsequently modified by the municipal corporation, unless

limited;<sup>32</sup> license fees may be required;<sup>33</sup> compliance with all ordinances in force or thereafter to be passed in reference to railroads;<sup>34</sup> and that disputes between grantee and its employees must be submitted to arbitration;<sup>35</sup> a percentage of the gross earnings from all sources may be exacted;<sup>36</sup> so with incidental expenses of the ordinance and a reasonable

such power is reserved in the ordinance. *Cleveland City Ry. Co. v. City of Cleveland* (C. C. N. D. Ed.), 12 O. C. D. 635, 47 O. L. B. 635.

Where a city council granted a street railway the right to lay tracks on public alleys and streets by payment of damages to abutting owners, and an abutting owner consented to the construction of a side track by the company in a certain alley, waiving all damages resulting therefrom, the company agreeing that if it became necessary to close the alley it would vacate its tracks, it was held that on the subsequent passing of an ordinance with the consent of the abutting owners that the alley should be vacated, and granted the use to another company, it became incumbent on the street railway company to vacate the track. *Getchell & Martin Lumber & Mfg. Co. v. Des Moines Union Ry. Co.* (Iowa), 87 N. W. 670.

32. *Dusenberry v. N. Y., W. & N. C. T. Co.*, 46 App. Div. (N. Y.) 267; *Hutchinson v. Borough of Belmar*, 62 N. J. L. 450, 45 Atl. 1092. But a city can impose no terms on the construction of a street railroad upon its streets where its consent is not made necessary for such construction. *Philadelphia v. Empire Pass. R.*

Co.

177 Pa. St. 382, 35 Atl. 721. And see *Whiting v. New Baltimore* (Mich.), 86 N. W. 403, 8 Det. Leg. N. 236.

33. *Mayor v. Broadway & Seventh Ave. R. Co.*, 17 Hun (N. Y.), 242; *Byrne v. Chicago, etc., R. Co.*, 63 Ill. App. 438, 1 Chic. L. J. W. 533; *affd.*, 169 Ill. 75, 48 N. E. 703, 7 Am. & Eng. Corp. Cas. (N. S.) 768. Not so however where the corporation is organized under a contract with good consideration expressed conferring rights and powers and defining upon what terms it might use the streets and run its cars. *Mayor v. Second Ave. R. Co.*, 32 N. Y. 261; *Mayor v. Third Ave. R. Co.*, 33 N. Y. 42; *Byrne v. Chicago G. R. Co.*, 169 Ill. 75, 48 N. E. 703, 7 Am. & Eng. Corp. (N. S.) 768, *affg.* 63 Ill. App. 438; *Mayor, etc. v. Third Ave. R. Co.*, 117 N. Y. 404, 27 St. Rep. (N. Y.) 170, 40 Am. & Eng. R. Cas. 278, 22 N. E. 755.

34. *Philadelphia v. Ridge Ave. Pass. R. Co.*, 143 Pa. St. 444, 22 Atl. 695, 28 W. N. C. 388, 48 Phila. Leg. Int. 414.

35. *Wood v. Seattle* (Wash.), 62 Pac. 135.

36. *Cincinnati v. Mt. Auburn Cable R. Co.* (Cin. Super. Ct.), 28 Ohio L. J. 276.

counsel fee;<sup>37</sup> the traffic may be limited strictly to the carriage of passengers although the charter of the company authorizes it to carry freight and express matter also.<sup>38</sup> The franchise carries with it not only the rights and conditions expressed, but those also which are necessarily to be implied, that is to say, those which are, not simply convenient, but indispensable.<sup>39</sup> It is a well-settled principle however that no implication will be indulged in derogation of the rights of the public, in the absence of express or plain

37. Hutchinson v. Borough of Belmar, 62 N. J. L. 450, 45 Atl. 1062. To the grant of the right to occupy its streets with street railway tracks the city may attach conditions necessary to protect itself from pecuniary liability and to secure the health and welfare of its citizens. Springfield v. Robberson Ave. R. Co., 69 Mo. App. 514. It is not a waste of municipal property to allow a street railroad company to lay a railroad track upon a street of New York city on payment of \$100 per annum and all expenses. Hart v. Mayor, 16 App. Div. (N. Y.) 227, 44 N. Y. Supp. 767. When the road is constructed under proper authority on a street outside the city limits, the company cannot be compelled, after such street has been brought within the limits, to remove its tracks because of its failure to comply with the terms on which it was originally allowed to use the street. Johnson v. Owensboro & N. R. Co., 18 Ky. L. R. 276, 36 S. W. 8.

38. St. Louis & M. R. Co. v. Kirkwood, 159 Mo. 239, 53 L. R. A. 300, 60 S. W. 110. But in Nebraska it has been recently de-

cided that the privileges of the company are determined by the general law, and not by the ordinances under which, with the consent of the majority of the electors, it is given the right to use the streets. Lincoln St. Ry. Co. v. Lincoln, 84 N. W. 802.

39. Detroit Citizens' R. Co. v. Detroit R. Co., 171 U. S. 48, 43 L. Ed. 67. A street railroad company which has accepted a franchise from a city and has laid its road in the streets in accordance therewith cannot arbitrarily discontinue the operation of any part of such road to the detriment of the city and its inhabitants, as an implied condition attaches to the grant that it be held for public benefit. Nor can it avoid its duty to operate a portion of its road, because it has rightfully or wrongfully been excluded from a county bridge separating such portion from the rest of the road until it will comply with certain conditions, where it is practicable to operate both portions of the road without crossing the bridge. State, Bridgeton v. Bridgeton, etc., Co. (N. J. Sup.), 62 N. J. L. 592, 45 L. R. A. 837, 43 Atl. 715.

terms of grant. An intention to grant an exclusive privilege or monopoly will not be implied, nor will a grant of privileges be given scope and effect, in restriction of public right, beyond what the plain words employed require. This is an established principle applicable in the construction of grants by the State, and it is equally applicable in the construction of grants or privileges by a municipal corporation affecting public rights.<sup>40</sup> As illustrating these principles, a provision of the franchise giving the railroad company the privilege of laying all necessary sidings, connections, and switches for the proper working and accommodation of the railroad in specified streets does not justify a substantial addition to its road which is not a mere adjunct of its authorized line.<sup>41</sup>

40. N. Balt., etc., Ry. Co. v. North Ave. Ry. Co., 4 Am. Electl. Cas. 1, 9, 75 Md. 233; Omaha H. Ry. Co. v. Cable Tramway Co., 30 Fed. 324; Sioux City St. Ry. Co. v. Sioux City, 138 U. S. 98, 107, 34 L. Ed. 898; Junction Pass. Ry. Co. v. Williamsport Pass. Co., 154 Pa. St. 116, 32 W. N. C. 152, 26 Atl. 295. A street railroad company has no exclusive right to the use of the street covered by its tracks, except where the necessities of its operation require that such rights should be conceded it. Edgerton v. O'Neill, 4 Kan. App. 73, 46 Pac. 206. No power is conferred upon cities by Ohio Rev. Stat., § 3438, to authorize street railway companies to extend their roads over State or county roads under supervision of the county commissioners, without condemnation or an agreement with the commissioners, but only to grant such right subject to the obligation of

making such agreement or instituting such proceedings. Citizens, etc., Co. v. County Comrs., 56 Ohio St. 1, 37 Ohio L. J. 165, 46 N. E. 60. An ordinance granting the right to operate a railroad in certain streets by electricity or such other power as will not necessarily obstruct the public use of the streets confers no right independently of the city's consent or its effect upon other public uses of the streets to use steam as a motive power. Houston v. Houston B. & M. P. Co. (Tex.), 19 S. W. 786; Hamilton & L. E. T. Co. v. Hamilton (Ohio C. P.), 1 Ohio N. P. 366.

41. Central Crosstown R. Co. v. Met. St. R. Co., 17 Misc. Rep. (N. Y.) 716, 40 N. Y. Supp. 1095. But a contract between a municipality and a railroad company, authorizing the use of streets for the construction of a single railway track, authorizes the necessary switches to enable the running of cars in

Because the ordinance imposes certain terms accepted by the company as consideration, the company is not relieved from liability for license fees imposed upon electrical poles and wires as a police regulation.<sup>42</sup> Where the company is authorized to operate a street car system in connection with which it maintains a carbarn fronting on one street with its sides abutting on others, it is entitled to bring in and take out its cars over tracks upon the side streets, although such right is not expressly granted in the ordinance.<sup>43</sup> Where the ordinance permitted the laying of "tracks or track" and the company laid a single track, it was held that they had the right at any time thereafter to construct another track;<sup>44</sup> under authority to construct "a horse railroad track or tracks" the railroad may be operated by electricity; and where it is authorized to operate by any motive power it may deem expedient and proper, it is not confined to the animal and steam power known or in practical use at the time of the grant, but it may use the electrical trolley system.<sup>45</sup> An easement granted for a particular purpose ceases when its use for such purpose is or becomes impossible under the terms of the grant.<sup>46</sup> The rate of speed can-

both directions. *Wilkes-Barre v. Coalville Pass. Ry. Co.* (C. P. Pa.), 8 Kulp, 298.

42. *McKeesport v. Citizens' Pass. R. Co.*, 2 Super. Ct. (Pa.) 249.

43. *Romer v. St. Paul City R. Co.*, 75 Minn. 211, 77 N. W. 825.

44. *Workmen v. So. Pac. R. Co.*, 62 Pac. 185, 316.

45. *Paterson Ry. Co. v. Grundy*, 4 Am. Electl. Cas. 173, 51 N. J. Eq. 231, 26 Atl. 788. And see

*Hudson R. Tel. Co. v. Watervliet Tp. & Ry. Co.*, 135 N. Y. 393, 17

L. R. A. 674, 48 St. Rep. (N. Y.) 417, 31 Am. R. & Corp. Rep. 619, 32 N. E. 148; *Lockhart v. Craig St. R. Co.*, 139 Pa. St. 419, 47 Am. & Eng. R. Cas. 57, 21 Atl. 26, 9 R. & Corp. L. J. 183.

An exclusive legislative grant of a right to build, erect, and operate horse railways does not apply to a cable tramway. *Omaha H. R. Co. v. Cable Tramway Co.*, 30 Fed. 324.

46. So an easement to lay and maintain a railroad track in a street on condition that the cars

not be controlled by any stipulation in the consent of the local authorities to the use of the streets for railroad purposes, since it is a matter within the police power of the State, and the municipality cannot divest itself of the power to regulate the speed as circumstances may require.<sup>47</sup> The observance of the conditions imposed by the local authorities when granting the franchise can only be enforced by the local authorities, unless it be a matter of such public concern that any citizen, in the interest of the public, may compel it.<sup>48</sup> The Federal court has jurisdiction to grant relief by injunction in case an ordinance relating to street railways impairs an existing contract right or practically constitutes the taking of property without due process of law.<sup>49</sup>

### § 12. When consents may be presumed.—Consent, at least as to private persons, if not as to the municipality itself, may be

should be moved thereon by animal power only is at an end if practical use of the track cannot be made by animal power. So. R. Co. v. City of Memphis (U. S. C. C. A. Tenn.), 97 Fed. 819.

47. Brooklyn v. Nassau El. R. Co., 20 App. Div. (N. Y.) 31.

48. So held where the ordinance declared that the franchise should not authorize any other company to use it. Chicago & S. S. R. T. R. Co. v. Northern Trust Co., 90 Ill. App. 460.

49. Cleveland City Ry. Co. v. City of Cleveland (C. C. N. D. Ed.), 12 O. C. D. 635, 47 O. L. B. 635. In the case cited, it appeared that the city had granted to several companies street railway franchises with reservation of the right to subsequently regulate rates of fare; but afterward, without such reservation, granted addi-

tional rights for extensions, additional tracks, etc., with new conditions as to paving and increased service, and provided that but one fare should be charged between certain points. Such companies were consolidated subsequently with other lines, in whose franchises no reservation as to fare was made, into two large systems, the city consenting and providing in their consent for transfers to other cars in order to permit passengers to ride over the two lines for one fare. It was held that such limitation operated to repeal the provisions in the original franchises authorizing the city to regulate the rates of fare, and that an ordinance requiring the consolidated companies to reduce rates was unconstitutional, since it impaired the obligation of the contracts.

by ratification as well as by previous permission, and after five years' operation, certainly as against a private person complaining, a trolley line must be presumed to have been rightfully on the street, and therefore not a public nuisance.<sup>50</sup> And where tracks have been located on the side or in the center of a street for a long time the proper authorities will be presumed to have consented to such location.<sup>51</sup> Unless property rights are invaded, the usurpation of a franchise is a matter only between the State and the company.<sup>52</sup>

**§ 13. Acceptance of franchise.**— No formal resolution of acceptance by the street railroad company is required to be filed, or made, in any case unless written acceptance is required by statute, or is imposed as a condition of their consent by the local authorities; and where written consent is thus required and filed the force thereof is not diminished by a declaration in the instrument of consent that the company waives none of its vested rights under its charter.<sup>53</sup> If the facts show an actual, practical acceptance by the company, or action which would be only explicable in case the franchise were accepted, it is sufficient.<sup>54</sup> A previous request for an ordinance obviates the necessity of a subsequent acceptance.<sup>55</sup> The acceptance of an ordinance extending

50. *Potter v. Scranton Traction Co.*, 6 Am. Electl. Cas. 95, 176 Pa. St. 271, 4 Am. & Eng. R. Cas. (N. S.) 307, 35 Atl. 188, 38 W. N. C. 453; *Pa. S. V. R. Co. v. Philadelphia R. Co.*, 160 Pa. St. 277.

51. *Twaddell v. Chester Traction Co.* (C. P.), 6 Del. Co. Rep. 399.

52. *Nichols v. Ann Arbor & Y. St. R. Co.*, 87 Mich. 361, 6 L. R.

A. 371, 49 N. W. 538, 50 Am. & Eng. R. Cas. 250.

53. *Trenton v. Trenton H. R. Co.* (N. J. Sup.), 19 Atl. 263.

54. *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114, 17 Sup. Ct. Rep. 653.

55. *City Ry. Co.* Case, *supra*; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Lincoln & K. Bank v. Richardson*, 1

the franchise of a street railroad company may be presumed from the fact that the amendment is beneficial to the corporation — especially when it proceeds to issue bonds falling due at the expiration of the enlarged franchise.<sup>56</sup> Upon acceptance, and not before, the contract is made and cannot be revoked,<sup>57</sup> and the railroad company having deposited an amount as liquidated damages in case of its failure to construct the road as agreed upon, cannot thereafter maintain an action to have the grant annulled, the contract rescinded, and to recover the deposit.<sup>58</sup> But mere silence, unless maintained for a considerable time, will not be held to indicate that the company has accepted an ordinance conferring rights and privileges not included in the company's charter, and also imposing upon it additional burdens.<sup>59</sup>

**§ 14. Rights under franchise, how and by whom questioned.—**  
The validity of the ordinance and consents under which a

Me. 79, 10 Am. Dec. 34; State, Carlton v. Dawson, 22 Ind. 272; Newton v. Carbery, 5 Cranch (C. C.), 632; Perkins v. Sanders, 56 Miss. 733.

56. City Ry. Co. Case, *supra*; Bank of U. S. v. Dandridge, 25 U. S. (12 Wheat.) 64, 6 L. Ed. 552; Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) 344; Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Bangor O. & M. R. Co. v. Smith, 47 Me. 34. Acceptance by a street railway company of an ordinance declaring that motormen and conductors must keep vigilant watch for persons on or moving toward the track and stop the car in the shortest time and space possible on the first appearance of danger

to such person, is not shown by the company's agreement to hold the city harmless from all damages that might occur to it by reason of the failure to comply with the ordinance. Murphy v. Lindell Ry. Co., 153 Mo. 252, 52 S. W. 442.

57. Township of Hamtramck v. Rapid Ry. Co. (Mich.), 81 N. W. 337; Richmond R. & E. Co. v. Brown, 97 Va. 26, 32 S. E. 775, 1 Va. S. C. Rep. 213; Hamilton, Jones v. C. & H. El. St. Ry. Co. (C. P.), 5 Ohio N. P. 457.

58. Peekskill R. Co. v. Peekskill, 21 App. Div. (N. Y.) 94, 47 N. Y. Supp. 305.

59. Western P. & S. Co. v. Citizens' St. Ry. Co., 128 Ind. 525, 26 N. E. 188, 10 L. R. A. 777.

street railway company constructed and is operating its road, and the fact that it failed to complete its road in conformity with, or within the time limited by, its franchise, or otherwise failed to comply with the obligations imposed upon it, cannot be raised in a suit to enjoin its operation by a private individual or another company, unless special or peculiar injury to the plaintiff can be shown. Such questions concern the public generally and not any particular individual, unless he has suffered a particular injury, and can only be raised by the State or city granting the franchise.<sup>60</sup> Even the municipality cannot complain that the grant of the right

60. Kitchell v. Manchester R. & El. R. Co., 79 Mo. App. 340, 2 Mo. App. Rep. 457; Black v. Brooklyn Heights R. Co., 32 App. Div. (N. Y.) 468, 53 N. Y. Supp. (87 St. Rep.) 312; Meixell v. Northampton Cent. St. Ry. Co., 7 North. Co. R. (Pa. Orph. Ct.) 274; Nichols v. Ann Arbor, etc., Ky. Co., 87 Mich. 361, 49 N. W. 538; *Re* N. Y. Elev. Ry. Co., 70 N. Y. 327; Attorney-General v. Fagan, 22 La. Ann. 545; North v. Pate, 170 N. Y. 356; Quinn v. Shields, 62 Iowa, 129, 17 N. W. 437; Chicago Gen. Ry. Co. v. Chicago City Ry. Co., 87 Ill. App. 17; affd., 57 N. E. 822; Linden Land Co. v. Milwaukee, etc., Co. (Wis.), 83 N. W. 851; New Orleans City & L. R. Co. v. New Orleans, 44 La. Ann. 748, 50 Am. & Eng. R. Cas. 391, 11 So. 77; Junction Pass. Ry. Co. v. Williamsport Pass. Ry. Co., 154 Pa. St. 116, 32 W. N. C. 152, 26 Atl. 295; Cairo & Vincennes R. Co. v. People, 92 Ill. 170.

An abutting owner who has no right in the fee of a street has nevertheless sufficient interest to

restrain, by injunction, the construction in the street of a trolley railroad where the consents of half the property in value bounded on the proposed line has not been secured. Merriman v. Utica Belt Line St. R. Co., 18 Misc. Rep. (N. Y.) 269, 41 N. Y. Supp. 1049.

One who seeks to restrain the building of a street railroad because necessary consents have not been obtained has the burden of proving the fact. O'Brien v. Buffalo Trac. Co., 31 App. Div. (N. Y.) 632, 52 N. Y. Supp. (86 St. Rep.) 322. An exclusive right in a street railroad company to operate its line in a city is such a property right as will entitle it to raise by injunction the question of forfeiture by a failure to perform the conditions of the charter of another company which has been granted the right to build a street railroad in certain streets of the same city. Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co. (Del. Ch.), 46 Atl. 12. And see McClean v. Westchester El. R. Co., 25 Misc.

to lay the tracks in certain streets is invalid because of the failure to secure the consent of property-owners.<sup>61</sup>

**§ 15. Conflicting grants or franchises.**—While a common council cannot properly so multiply street railroad tracks in a particular street as to interfere with the rights of the public therein,<sup>62</sup> yet the policy, and generally the express provision, of the law in every State prohibits the grant of an exclusive right to any one corporation to construct and operate a street railroad in any street. If on the face of any charter or ordinance an exclusive right be granted, it will be controlled by the power reserved in the legislature or in the municipal council to alter, amend, or repeal it, and where such exclusive right has been revoked by the legislature the company cannot object that the city gave consent to another company to use the streets.<sup>63</sup> The city cannot be estopped unless the former consent has been so acted upon by the first company

Rep. (N. Y.) 383; Denver & S. Ry. Co. v. Denver City R. Co., 2 Colo. 673.

61. Hamilton, Jones v. C. & H. St. El. R. Co., 5 Ohio N. P. 457.

62. St. Ry. Co. of Grand Rapids v. W. S. St. Ry. Co., 48 Mich. 433, 12 N. W. 643; Wood v. City of Seattle (Wash.), 62 Pac. 135; West Jersey Traction Co. v. Camden H. R. Co., 53 N. J. Eq. (8 Dick.) 163, 35 Atl. 49. A street railroad company acquires no exclusive right to city streets, although its charter gives it a right to extend its system to any street then or thereafter to be laid out. As between it and a rival company its right to operate in any street thereafter laid out depends upon prior occupancy. Africa v. Knox-

ville (C. C. E. D. Tenn.), 70 Fed. 729.

63. Birmingham, etc., St. Ry. Co. v. Ry. Co., 79 Ala. 465; Henderson v. Ogden City Ry. Co. (Utah), 26 Pac. 286, 46 Am. & Eng. R. Cas. 95; Canal & Clai-borne St. Ry. Co. v. Crescent City R. Co., 41 La. Ann. 561, 40 Am. & Eng. R. Cas. 329, 6 So. 849; Fort Worth St. Ry. Co. v. Rosedale St. Ry. Co., 68 Tex. 169, 4 S. W. 534; Cincinnati St. R. Co. v. Smith, 29 Ohio St. 291; New Orleans City R. Co. v. Crescent City R. Co., 12 Fed. 308; Des Moines St. R. Co. v. Des Moines Broadgauge St. R. Co., 73 Iowa, 513, 33 N. W. 610, 32 Am. & Eng. R. Cas. 209; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127

as to cause substantial loss if it be recalled.<sup>64</sup> So, under the power reserved by an ordinance to order the construction of any new line of street railroad, or the extension of any present or future lines of railroad, upon any or all streets of the city upon which sewers have been constructed, the common council may order the extension of the street car service of one line to and into the business or central part of the city over streets or parts of streets on which there is an existing track on which the cars of another line are already operated.<sup>65</sup> But the grant to operate a street railroad in a particular street prevents the common council from authorizing any other company to use such street in any way destroying, hindering, or embarrassing the use under the former franchise.<sup>66</sup> An ordinance granting exclusive right to operate

Ind. 369, 43 Am. & Eng. R. Cas. 234, 24 N. E. 1054; Milhau v. Sharp, 17 Barb. (N. Y.) 435, 28 id. 228; affd., 27 N. Y. 611, 84 Am. Dec. 314.

64. Wilmington City R. Co. v. People's R. Co. (Del. Ch.), 47 Atl. 245. Where an exclusive franchise has been granted to one corporation, an act giving another the right to construct railroad lines in the same street impliedly revokes such exclusive privilege under the power reserved to the legislature by the Constitution. Wilmington City Ry. Co. v. Wilmington, etc., Ry. Co., 46 Atl. 12. And see State v. Railway Co., 78 Minn. 331.

65. State v. St. Paul City Ry. Co. (Minn.), 81 N. W. 200. And see Birmingham Traction Co. v. Tel. Co., 7 Am. Electl. Cas. 405, 119 Ala. 144, 24 So. 731. Under an ordinance granting the right to use the tracks of another company upon such terms and condi-

tions, by lease or contract, as may be agreed upon between the companies, or otherwise, a street railroad company cannot use the tracks of the other company in absence of either lease, contract, invitation, acquiescence, or estoppel and in opposition to the will of the owner of the track. Chicago Gen. R. Co. v. Chicago City R. Co., 62 Ill. App. 502. One street railroad company cannot oust another company from the privilege of operating a railroad upon a street which the former company has permission from the municipality to occupy with its line, where its charter does not authorize it to lay its tracks upon such streets; nor can it recover damages. Dennison & S. R. Co. v. Dennison, etc., Co., 11 Tex. Civ. App. 137, 32 S. W. 332. And see People v. Kerr, 27 N. Y. 190.

66. City Ry. Co. v. Citizens' St. Ry. Co., 166 U. S. 557, 41 L. Ed.

street railroads by animal power only for thirty years does not deprive the municipality of the right to confer upon another company authority to operate railroads otherwise than by animal power.<sup>67</sup> And having granted to one company the exclusive right to use the city streets it is not thereby precluded from permitting another company to occupy those streets not already used by the first company.<sup>68</sup> In a contest between two electric street railroad companies, to each of which a city has granted the right to construct its line along certain streets, the court cannot determine whether one has forfeited its charter right to construct and operate its road; in the first instance, that is a matter for the determination of the city council.<sup>69</sup> Where the ordinance prescribes that a street railroad company to whom a right to construct and operate a railroad is granted should permit another company to use its tracks upon payment of a reasonable compensation, the latter company cannot be enjoined from such use on the ground that the compensation prescribed by the common council and tendered was inadequate,

1114; *Fidelity Trust & S. V. Co. v. Mobile St. R. Co.* (C. C. S. D. Ala.), 53 Fed. 687. And see *Germantown Pass. R. Co. v. Citizens' Pass. R. Co.*, 151 Pa. St. 138, 24 Atl. 1103, 31 W. N. C. 281.

67. *Teachout v. Des Moines B. R. Co.*, 75 Iowa, 732, 38 N. W. 145.

68. *Citizens' St. Ry. Co. v. Rosedale St. Ry. Co.*, 68 Tex. 169; *Gulf City St. Ry. Co. v. Galveston St. Ry. Co.*, 65 id. 502; *Covington St. Ry. Co. v. Covington, etc., Ry. Co.*, 1 Ky. L. R. 318; *Jackson, etc., R. Co. v. Inter-State R. T. Co.*, 24 Fed. 306. Where a corporation using city streets for

railroad purposes had refused to build an additional road lawfully required by the common council, it is discretionary with the council to make such changes in the proposed route as to adapt it to form a junction with the road of some company that will build it, even though in so doing a street in which the former company had had exclusive rights is used as a connecting link. *St. R. Co. v. West End St. R. Co.*, 48 Mich. 433, 12 N. W. 643.

69. *Hamilton St., etc., Co. v. Hamilton & L. E. T. Co.*, 5 Ohio C. C. 319.

without very clear proof of such inadequacy.<sup>70</sup> A street railroad having constructed its road in a street in New York city has a right, under the New York Railroad Law, to exclude another company from constructing a road there, and upon showing any special injury and damage to it, it may restrain, as a public nuisance, the unauthorized construction of such other road.<sup>71</sup>

**§ 16. Sale or lease of franchise and property.**—The franchise to be a corporation merely cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible.<sup>72</sup> To be the subject of sale and transfer, the law, by some positive provision, must make it so, and point out the modes in which such sale and transfer may be effected.<sup>73</sup> Unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchise, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises, and property of the first corporation, and such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.<sup>74</sup> The mere fact that

70. Kinsman St. R. Co. v. Broadway, etc., R. Co., 36 Ohio St. 239.

71. Central Crosstown R. Co. v. Met. St. R. Co., 16 App. Div. (N. Y.) 229.

72. Com. v. Smith, 10 Allen (Mass.), 448, 455.

73. Hall v. Sullivan R. Co., 21 L. R. 138, 2 Redfield R. Cas. 621,

1 Brunner Col. Cas. 613; Memphis v. Berry, 112 U. S. 604, 607, 28 L. Ed. 837, 841.

74. Pa. R. Co. v. St. Louis A. T. & H. R. Co., 118 U. S. 290, 309, 30 L. Ed. 83, 92; Oregon Ry., etc., Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. Ed. 837; Rafferty v. Central Trac. Co. (Pa. C. P.), 22 Pittsb. L. J. (N. S.)

the charter authorizes contracts with other companies for transportation of goods and passengers does not authorize the sale or lease of the entire road and franchises.<sup>75</sup> And the incidental use in the charter, or in some applicable legislative act, of the words "lessees," "successors," or "assigns," does not show a legislative intent to grant such powers.<sup>76</sup> In New York, and in many other States, the statutes expressly provide for the lease of the corporate franchises and property by one street surface railroad corporation to another for any term of years agreed upon, without any prohibition as to parallel or competing lines. The sale of all franchises and property is also expressly permitted in some cases;<sup>77</sup> but a lease or sale of such franchise and property (except of course the transfer of such property as will not hinder the corporation in the performance of all its duties to the public) cannot be made to a private individual.<sup>78</sup>

15. But see *Smith v. Reading Pass. R. Co.* (Pa. C. P.), 2 Pa. Dist. 490; affd. on other grounds, 156 Pa. St. 5, 26 Atl. 779. Where the statute forbids a street railroad company to sell or lease its road, it has no right to refuse to accept a portion of its line from a construction company, and, under pretense of selling the material, abandon its line and turn over the entire property to a rival company. *Clemmens El. Mfg. Co. v. Walton*, 173 Mass. 286, 52 N. E. 132, 53 id. 820. Nor having accepted a franchise and laid its road in the streets in accordance therewith can it arbitrarily discontinue the operation of any part of such road to the detriment of the city and its inhabitants, since an implied condition attaches to the

grant that it be held for public benefit. *State, Bridgeton v. Bridgeton, etc., Co.*, 62 N. J. L. 592, 45 L. R. A. 837, 43 Atl. 715.

75. *Thomas v. Railroad Co.*, 101 U. S. (11 Otto) 71, 25 L. Ed. 950.

76. *Thomas v. Railroad Co.*, 101 U. S. (11 Otto) 71, 25 L. Ed. 950; *Oregon Ry., etc., Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 32 L. Ed. 837.

77. The New York Railroad Law, chap. 565 of 1890, art. III; 3 Heydecker's Gen. Laws (2d ed.), 3296-3305. And see *Wright v. Milwaukee El. & R. L. Co.*, 95 Wis. 29, 36 L. R. A. 47, 69 N. W. 791; *People, Warfield v. Sutter St. R. Co.*, 117 Cal. 604, 49 Pac. 736.

78. *Abbott v. Johnstown, etc., R. Co.*, 80 N. Y. 27.

When a lease is effected to an individual the law seems to treat the lessee as the agent of the railroad company for the purpose of determining controversies between the public and such company.<sup>79</sup> Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposed, is a violation of the contract with the State, and is void as against public policy.<sup>80</sup> A contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it, by any partial performance, become the foundation of a right of action.<sup>81</sup> The United States Supreme Court has held that leases made without legislative sanction, and therefore void, cannot be enforced, even as to past-due rent, although the lessees were and still remain in undisturbed possession of the demised

79. Durfee v. Johnstown, etc., R. Co., 71 Hun (N. Y.), 279, 281, 54 St. Rep. (N. Y.) 526, 24 N. Y. Supp. 1016; Fisher v. M. E. R. Co., 34 Hun, 433; Woodruff v. The Erie Ry. Co., 25 Hun (N. Y.), 246.

80. Thomas v. Ry. Co., *supra*; Railroad Co. v. Winans, 58 U. S. (17 How.) 30, 15 L. Ed. 27; Black v. Canal Co., 22 N. J. Eq. (7 C. E. Green) 130; Beman v. Rufford, 1 Sim. (N. S.) 550; Winch v. Railroad Co., 13 L. & Eq. 506; Coe v. Columbus, etc., R. Co., 10

Ohio St. 372; Middlesex R. Co. v. Boston, etc., R. Co., 115 Mass. 347; Rollins v. Clay, 33 Me. 132; Fetsam v. Hay, 122 Ill. 293.

81. Thomas v. Railroad Co., *supra*; Oregon, etc., Ry. Case, *supra*; Ashbury, etc., Ry. Co. v. Riche, L. R. 7 H. L. 653; East Anglian Ry. Co. v. Eastern Co. Ry. Co., 11 C. B. 775; Winch v. Birkenhead, etc., Co., 13 Eng. L. & Eq. 506; Green Bay, etc., Co. v. N. Y. Steamboat Co., 107 U. S. 98, 27 L. Ed. 413.

property.<sup>82</sup> Its position upon the subject is, that a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, and that the proper remedy of the party aggrieved is to disaffirm the contract and sue to recover, as on a *quantum meruit*, the value of what the defendant has had of actual benefit.<sup>83</sup> The New York Court of Appeals has held that such an unauthorized lease, void as to the public, will be upheld, as between the parties, to the extent that so long as the occupation under the lease continued the lessee was bound to pay the rent, and its recovery might be enforced by action on the covenant.<sup>84</sup> Assuming now the statutory authority to dispose of it, a right of way upon a public street, whether granted by act of the legislature, ordinance of city council, or in any other valid mode, is an easement, and as such is a property right capable of assignment, sale, lease, and mortgage, and entitled to the protection afforded other property rights and contracts.<sup>85</sup> Where the lease is authorized by statute, it may be made by the board of directors of the lessor; and the concurrence of the stockholders is not essential to its validity.<sup>86</sup>

82. Pa. R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290, 30 L. Ed. 83; Oregon Ry., etc., Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. Ed. 837; St. Louis, etc., R. Co. v. Terre Haute R. Co., 145 U. S. 393, 3 L. Ed. 748.

83. Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 44, per VANN, J., 45 N. E. 390; Pittsburgh, etc., R. Co. v. Keokuk, etc., Co., 131 U. S. 371, 389, 33 L. Ed. 157; Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153; Parkersburgh v. Brown, 106 U. S. 487, 503, 27 L. Ed. 238; Chapman v. Douglas Co., 107 U.

S. 348, 360, 27 L. Ed. 378; Salt Lake City v. Hollister, 118 U. S. 256, 263, 30 L. Ed. 176.

84. Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 36, 45 N. E. 390.

85. Knoxville v. Africa (C. C. E. D. Tenn.), 70 Fed. 729; Wilkes-Barre v. Coalville Pass. Ry. Co. (Pa. C. P.), 8 Kulp, 298; Bards-town & Louisville R. Co. v. Metcalf, 4 Metc. (Ky.) 199; New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501, 29 L. Ed. 244.

86. Beveridge v. N. Y. E. R. Co., 112 N. Y. 1, 19 N. E. 489.

An assignee or lessee of a street railroad company which accepts the transfer of all the franchises, powers, privileges, and immunities of the grantor and its line of road, and operates it for a time, thereby assumes the performance of the duties theretofore resting on its grantor, such as providing a stated car service required by the ordinance by which the right to construct the road is granted.<sup>87</sup> A street railroad company, by law forbidden to use the electric trolley system, can confer upon its lessee no greater right than itself has. And a resolution of a county board authorizing such lessee company to use "any mechanical power except steam," must be construed as meaning any power which the company could legally use, and so not to warrant the use of the trolley system.<sup>88</sup> An ordinance authorizing the use of the trolley system by the lessor company confers such authority upon the lessee in exclusive control of the road, although not named in the ordinance.<sup>89</sup> The provision of a statute for the sale on execution of the property and franchises of corporations authorized to receive "toll" applies to street railway companies.<sup>90</sup> An action by a stockholder of a street railroad corporation, upon a claim that he

87. *Potwin Place v. Topeka R. Co.* (Kan.), 33 Pac. 309; *Reeves v. Philadelphia Trac. Co.*, 152 Pa. St. 153, 31 W. N. C. 265, 32 Am. L. Reg. 127, 25 Atl. 516; *Wallace v. Ann Arbor El. Ry. Co.* (Mich.), 80 N. W. 572; *State, Bridgeton v. Bridgeton, etc., Co.*, 62 N. J. L. 592, 45 L. R. A. 837, 43 Atl. 715; *P. P. & C. I. R. Co. v. C. I. B. R. Co.*, 144 N. Y. 152, 26 L. R. A. 610, 63 St. Rep. (N. Y.) 48, 1 Am. & Eng. R. Cas. (N. S.) 222, 39 N. E. 17.

88. *State, Lewis, Pros. v. Free-*

holders

holders, 4 Am. Electl. Cas. 48, 56 N. J. L. 416.

89. *Reeves v. Traction Co.*, 4 Am. Electl. Cas. 24, 152 Pa. St. 153.

90. *McKee v. Grand Rapids, etc., St. Ry. Co.*, 41 Mich. 274, 1 N. W. 873, 50 id. 469. In the case cited, the court said: "Tolls, at common law, include a large class of dues and exactions that are in the nature of fixed rights and cannot be lawfully exacted, and are generally, if not universally, connected with some fran-

has been defrauded of a portion of his interest in the corporate assets by means of a lease made by the directors and approved by the vote of the required number of stockholders, and in which he seeks to set aside the lease, compel the transfer of all the property covered by the lease, and to require the lessee to account to the lessor for all moneys received from the operation of the road, is not for the benefit of the plaintiff alone, but is representative in character and for the benefit of the plaintiff and all other stockholders similarly situated. Therefore a demand upon the corporation lessor to sue must be made, and an averment of such demand in the complaint, and of the refusal or unreasonable neglect to comply therewith, is essential to the maintenance of the action.<sup>91</sup> The New York Rapid Transit Acts do not contemplate or permit a lease in perpetuity.<sup>92</sup>

**§ 17. Abandonment or revocation of franchise.**—While the municipality cannot by contract with the railroad company divest itself of its control over streets and of its right and duty to adopt ordinances and measures in the nature of police regulations, it cannot, without an express reservation to that effect, in the ordinance granting the right to construct and operate a street railroad which the company has accepted as its franchise, impose additional obligations or materially change its provisions in any respect against the will of the company. It cannot recall or revoke the accepted franchise after the grantee has in good faith begun to exercise its powers and perform its duties thereunder.<sup>93</sup> But, if

chise which involves duties as well as privileges of a general or public nature, such as those which belong to street railroads, fairs, turnpikes and ferries."

91. Flynn v. Brooklyn City R.

Co., 158 N. Y. 493, 53 N. E. 520.

92. Sun Printing and Pub. Co. v. Mayor, 152 N. Y. 257, 46 N. E. 499.

93. People v. Chicago W. Div. R. Co., 118 Ill. 113, 7 N. E. 116;

the company does not comply with the condition imposed by the consent of the local authorities, its franchise may be revoked; and such revocation will deprive the company of authority to build the road.<sup>94</sup> If the failure to perform the condition is caused by injunction or interference of the police officers acting under the direction of the mayor, the license or franchise is not revoked.<sup>95</sup> An easement granted for a particular purpose ceases when its use for such purpose is or becomes impossible under the terms of the grant.<sup>96</sup> Under a statute providing that all legislative power of the city shall be vested in a mayor and city council, the city has

*El. Ry. Co. v. Grand Rapids*, 84 Mich. 257, 47 N. W. 567; *Lavis v. Newton* (C. C. S. D. Iowa), 75 Fed. 884; *Workmen v. So. Pac. R. Co.*, 62 Pac. 185, 316; *Western Pav. & Sup. Co. v. Citizens' St. Ry. Co.*, 128 Ind. 525, 26 N. E. 188, 10 L. R. A. 770. Where the franchise of a street railroad company is granted by the State, it can be abandoned only in the same way as any other corporate franchise granted by the State. *Africa v. Knoxville* (C. C. E. D. Tenn.), 70 Fed. 729.

94. *Plymouth Tp. v. Chestnut Hill & N. R. Co.*, 168 Pa. St. 181, 32 Atl. 19, 36 W. N. C. 317.

95. *Chicago v. Chicago*, etc., R. Co., 105 Ill. 73. And see *Scranton Ry. Co. v. City of Scranton* (Pa. C. P.), 5 Lack. Leg. N. (Pa.) 250.

96. As, where an easement to lay and maintain a railroad track in a street is granted by a city on condition that animal power only should be used to move the cars thereon, and because of the grade

of the street use of animal power for the purpose intended was impracticable, the easement is therefore at an end, and the city may require the track to be removed. *So. Ry. Co. v. Memphis* (Tenn.), 97 Fed. 819, 38 C. C. A. 498; decree modified (1889), 99 Fed. 170, 39 C. C. A. 451.

An agreement by the city to permit a street railroad company to lay its tracks in specified streets will not be specifically enforced after the lapse of more than ten years from the revocation of the ordinance granting the permission, where the city had doubled its population and many other changes had been made rendering the performance of such contract detrimental to the public. See *St. Louis, etc., R. Co. v. St. Louis*, 81 Ill. App. 109.

See as to revocation of consent of property-owners under New Jersey statute of April 21, 1896, *Hutchinson v. Borough of Belmar*, 61 N. J. L. 443, 39 Atl. 643; affd., 62 N. J. L. 450, 45 Atl. 1092.

a right to accept the voluntary surrender of a street railroad franchise.<sup>97</sup> But it cannot make a contract with the company to the effect that nonuser of street railway tracks for a specified time shall not operate as a forfeiture of the franchise, since this would involve authority to grant the right to use the streets for a private purpose. Entire failure to operate a street railway for three years, when the ordinance under which the franchise is exercised requires cars to run sixteen hours every day in the year, constitutes a nonuser which forfeits the franchise.<sup>98</sup>

**§ 18. Expiration of franchise and renewal.**—A franchise for a term of years, unless renewed, terminates at the expiration of the term, although the charter of the company declares it to be "a body politic and corporate in perpetuity," where the consent of the common council is made a condition precedent to the right to exercise the franchise.<sup>99</sup> And by consenting during the term to a large expenditure of money upon the part of the railroad company (as by the substitution of electricity for animal power) the city is not estopped to assert the expiration of the franchise.<sup>1</sup> Where the concurrent action of two city boards is necessary to the renewal

97. *Wood v. Seattle* (Wash.), 62 Pac. 135.

98. *State, Kansas City v. East Fifth St. R. Co.*, 140 Mo. 539, 38 L. R. A. 218, 41 S. W. 955.

99. *City R. Co. v. Citizens' St. R. Co.*, 52 N. E. 157; *Hannum v. Media, etc., Co.* (Pa. C. P.), 8 Del. Co. Rep. 91.

1. *Louisville Trust Co. v. Cincinnati* (C. C. App. 6th C.), 47 U. S. App. 36, 22 C. C. A. 334, 76 Fed. 296, 73 id. 716; *Canal, etc., St. R. Co. v. City of New Orleans*,

39 La. Ann. 709, 2 So. 388. In the case first cited, it was also held that the fact that no limitation is imposed upon the duration of the corporate franchise of the railroad company does not make the term for which it holds its street grants likewise unlimited; and that a grant to use certain streets disused for a period of over twenty years and a selection of another route is an abandonment of the franchise as to the streets not actually used.

of a street railroad grant, consent by one of them cannot be effective as a renewal by implication.<sup>2</sup> If a grant is made for a term exceeding the statutory limit it will be effective during the period permitted by statute, and will then, unless renewed, terminate by operation of law.<sup>3</sup> The consent of the abutting property-owners is not required for an extension or renewal of the franchise.<sup>4</sup> Whenever in the opinion of the local authorities the public would be benefited they may, by agreement with the grantee, terminate a franchise previous to its expiration or renew it for any period not in excess of the statutory limit.<sup>5</sup>

2. Cincinnati Inc. Plane R. Co. v. Cincinnati, 52 Ohio St. 609, 44 N. E. 327.

3. Sommers v. Cincinnati, 8 Am. L. Rec. 612.

4. Clement v. Cincinnati, 16 W. L. B. 355; State, Hadden v. E. Cleveland R. Co., 6 Ohio C. C. 318.

5. The City Ry. Co. v. Citizens' St. R. Co., 166 U. S. 557, 41 L. Ed. 1114. In the case cited, the court, per Mr. Justice BROWN, said: "The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railroad thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company, and the road built and operated as specified, became a contract which the State was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company,

and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no further consideration to support it than the continued operation of the road under such conditions as the city chose to impose. But this is practically such a case, since it makes no difference in principle whether the road passes into the hands of a new company or is retained by the old one, or whether the extension is granted at the time of or before the original franchise expired. In either case the consideration, viz., the continued operation of the road, is the same. If, instead of extending the original ordinance, this ordinance had been surrendered by the company, and a new one had been enacted by which the franchise was extended, it would hardly be contended that the continued operation of the road would not be sufficient consideration for the new ordinance."

A railroad company was origi-

**§ 19. Forfeiture; how waived.**—The rights under a street railroad franchise granted by a city cannot be forfeited, except for the cause and in the mode prescribed in the franchise, where the act authorizing the city to grant the franchise makes no restriction.<sup>6</sup> And where it is stipulated in the franchise or license that upon breach of condition the municipality may resume control of the streets, possession thereof cannot be taken by force against the resistance of the licensee.<sup>7</sup> Proceedings must be had in a competent court

nally chartered for thirty years only, and solely for the purpose of building and using a horse railroad in the city of Augusta, with the consent of the city council, which consent it had obtained for the thirty years. By an act continuing the charter it was expressly provided that it should not have the effect or be construed to extend or continue in force the several amendments of the original charter, or the ordinances and contract by which the original consent of the city was given. *Held*, that the consent of the city must be obtained for the renewal. *Augusta & S. R. Co. v. Augusta*, 100 Ga. 701, 28 S. E. 126.

6. *Dern v. Salt Lake City R. Co.*, 19 Utah, 46, 56 Pac. 556; *Potter v. Collis*, 156 N. Y. 16, 50 N. E. 413, affg. 19 App. Div. (N. Y.) 392.

A city in granting a franchise to a street railroad to occupy its streets may stipulate that it shall be void if default is made in the payment of the company's share of street-paving improvement. *Union St. R. Co. v. Snow*, 113 Mich. 694, 4 Det. Leg. N. 455, 71 N. W. 1073.

7. *Iron Mt. R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 113. A municipality will be restrained from adopting an ordinance whereby it is sought to forfeit the rights and franchises of a street railroad company on the ground that it has failed to operate a continuous line of road or run cars as stipulated, where its failure is due to its inability to obtain the continuous right of way for which it is diligently negotiating with prospects of success. *N. J. St. Ry. Co. v. S. Orange Tp. (N. J. Ch.)*, 43 Atl. 53. And see *Noyes v. Anderson*, 124 N. Y. 175. But on the repeal of an ordinance authorizing the company to operate a street railroad over certain streets for a nominal consideration within a week after its passage, if the company lie by for ten years, during which time the city doubles in population, extends its streets, erects a public school building abutting on the line of the streets, and citizens build residences along the same, it cannot restrain the city by action in equity from preventing the building of the road. See *St. Louis, etc., Ry. Co. v. City of East St.*

or before that officer or body authorized by law to determine and declare the forfeiture.<sup>8</sup> Ordinarily, proceedings must be taken on behalf of the State to establish and enforce the forfeiture, and until the State thus intervenes, a private individual cannot set up the forfeiture or in any way challenge the corporate existence.<sup>9</sup> Where the right to enforce the forfeiture is purely statutory and the statute prescribes the procedure therefor and the court to control it, the forfeiture must be sought in such court and in the manner prescribed. In New York the practice is prescribed in articles III and IV of chapter 15, title 2 of the Civil Code;<sup>10</sup> and the complaint must show on its face corporate acts or omissions such as not only put the company in the wrong, but such as were either voluntary or negligent, and so material a disobedience of the public will as within established rules to warrant a judgment of dissolution.<sup>11</sup> Failure of the railroad company to complete a road in territory described in an unconstitu-

Louis, 102 Ill. 433, 55 N. E. 533; Easton, etc., Ry. Co. v. Easton, 133 Pa. St. 505; Asheville St. Ry. Co. v. Asheville, 109 N. C. 688, 14 S. E. 316; Young v. Magazine St. R. Co., 24 La. Ann. 53.

8. Attorney-General v. Chicago, etc., R. Co., 112 Ill. 520; State, Attorney-General v. Madison St. Ry. Co., 72 Wis. 612, 40 N. W. 487; Reid v. Omnibus R. Co., 33 Cal. 212; Matter of Brooklyn El. R. Co., 125 N. Y. 434, 26 N. E. 474; Matter of Kings Co. El. R. Co., 105 N. Y. 97, 13 N. E. 18; Wilmington City Ry. Co. v. Wilmington, etc., Ry. Co. (Del. Ch.), 46 Atl. 12.

9. Matter of B. E. R. Co., 125 N. Y. 434, 26 N. E. 474. In the case cited, it was held that the fact that the company had made de-

fault and forfeited its rights was no answer or defense in proceedings on the part of the company to acquire title to the lands for the purposes of its road.

The removal of railroad tracks from a highway and the abandonment of the operation of the road operates merely as a cause of forfeiture of which the people alone can take advantage, and does not of itself forfeit the franchise over the road so as to prevent the relaying of the tracks. Greford v. C. I. & B. R. Co., 6 App. Div. (N. Y.) 204, 40 N. Y. Supp. 1150.

10. See §§ 1784-1803.

11. People v. A. A. R. Co., 125 N. Y. 513, 26 N. E. 622. In the case cited, nonuser for five days was charged. The Civil Code, § 1785, prescribed a sus-

tional section of its charter is not a cause of forfeiture.<sup>12</sup> And as a general rule a forfeiture for nonuser or for misuser, temporary in its character, although continuing for a number of years, will not be adjudged against a street railroad company which has in good faith exercised a portion of the powers and rights conferred upon it, and had been discharging some of its duties to the public. Thus, where the franchise granted is conditioned upon the laying of double tracks in certain streets, and the company for a series of years operated but one therein, unless the circumstances show a willful intent to disregard the company's obligation to the public a forfeiture will not be declared therefor.<sup>13</sup> The breach of any condition imposed by a municipality in granting a franchise, or license, to a street railroad company to occupy any street in the city, which might work a forfeiture of the grantee's right, may be waived by the municipality.<sup>14</sup> If the condition broken be a subsequent one, that is, a con-

pension of its ordinary and lawful business for at least one year as a cause of forfeiture. The complaint was held insufficient. And see *Wright v. Milhau El. R. & L. Co.*, 95 Wis. 29, 36 L. R. A. 47, 69 N. W. 791; *Matter of C. I., F. H. & B. R. Co. v. Kennedy*, 15 App. Div. (N. Y.) 588, 44 N. Y. Supp. 825.

12. *Bohmer v. Haffen*, 161 N. Y. 390, 55 N. E. 1047.

13. *Hestonville, etc., Ry. Co. v. Philadelphia*, 89 Pa. St. 210; *Ranson v. Citizens' Ry. Co.*, 104 Mo. 375, 16 S. W. 415; *People's Pass. Ry. Co. v. Philadelphia*, 14 Phila. 231; *Philadelphia, etc., R. Co. v. Williams*, 54 Pa. St. 103; *City of Elmira v. Maple Avenue R. Co.*, 4 N. Y. Supp. 942; *State ex rel.*

*St. Charles St. R. Co. v. Cockran*, 25 La. Ann. 356; *Henderson v. Central Pass. Ry. Co.*, 21 Fed. 358. But in the case last cited there was a nonuser for more than ten years without the consent of the State or local authorities, and it was held that such nonuser was sufficient evidence of abandonment of the right in the streets not used, although it appeared that the patronage along the abandoned route was insufficient to recompense the company for the outlay necessary to build, equip, and operate the road. And see *Gerard College Pass. R. Co. v. Thirteenth St., etc., Ry. Co.*, 7 Phila. 620.

14. *Chicago City Ry. Co. v. People*, 73 Ill. 541.

dition which attaches only after a material part of the road is constructed and operated, the municipality will be presumed to have waived the breach, unless it moves with reasonable promptitude and before such expenditures have been made by the railroad company as would make the declaration of the forfeiture an inequitable act.<sup>15</sup> A municipality however does not waive the forfeiture of the franchise in the streets for nonperformance of conditions subsequent, by its simple failure to take any action to remove the tracks after the breach of the condition, or take any proceedings to have the franchise declared forfeited, where the circumstances show that the franchise is held, not for the convenience of the public, but to prevent facilities for travel and enforce patronage upon another line of the company.<sup>16</sup> In a proceeding to forfeit its charter the company may interpose as a defense the fact that it was prevented from con-

15. New Orleans, etc., R. Co. v. New Orleans, 44 La. Ann. 748, 11 So. 77. It should be remembered however that considerations of policy and justice both demand that the duty of a street railroad company, in regard to the proper construction of its road, should be rigidly enforced, particularly where no compensation is paid to the municipality or to the abutting owners for the use of the street by the company and where such use impairs the free public use of a street. See Fitts v. Cream City R. Co., 59 Wis. 323, 15 Am. & Eng. R. Cas. 462, 18 N. W. 186; Birmingham Union R. Co. v. Alexander, 93 Ala. 133, 9 So. 525; Citizens' St. R. Co. v. Twiname, 111 Ind. 587, 30 Am. & Eng. R. Cas. 616, 13 N. E. 55.

16. People, Warfield v. Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736. In the case cited, it appeared that a track in a thickly-settled portion of the city had been laid for more than six years, and practically not operated except by running one car over it every day for the purpose of preserving the franchise. It was held, in an action for a judgment declaring the franchise forfeited because of failure to comply with the conditions, that the city was not estopped by *laches*, and that because it appeared the company willfully ignored its duty to the public and sought only its own advantage, the court might, in declaring the forfeiture, impose the maximum fine.

structing its track by an injunction issued at the instance of a third party, or in any other way it may show that its neglect or omission to perform a duty imposed by the franchise was not intentional and willful on its part;<sup>17</sup> but it cannot prevent the city from declaring its franchise to occupy the streets forfeited under an option reserved by the ordinance granting the franchise, in case of the company's default in the payment of paving expenses, upon the ground of its insolvency and inability to pay such expenses.<sup>18</sup> Where a clause of a franchise granted provided that a street railroad company should forfeit the "road" to the city in one year after it ceases to operate it, a forfeiture includes the rails as well as the franchise and may be judicially enforced; the clause does not provide a penalty or liquidated damages.<sup>19</sup>

**§ 20. When specific performance of contract for mutual co-operation in securing franchise, will be refused.**—A contract between two persons for mutual co-operation in securing a franchise for a street railway, and the equal division of what may be realized from the enterprise, will not be enforced in equity by decreeing that one of the persons who has been excluded by the other from the benefit of the franchise, which was granted to the latter by the city with a knowledge of all the facts, shall have a one-half interest in the franchise, property, and stock of the corporation to which the franchise was granted, but he will be left to his remedy at law.<sup>20</sup>

17. State, St. Charles St. R. Co. v. Cockran, 25 La Ann. 356. If a railroad company fail to complete the construction of its way within the time limited by statute, its rights, privileges, and franchises are forfeited, although it had been restrained from completing the road by injunction, on account of its failure to secure the consent of the abutting property-

owners. Commonwealth v. Mid-dletown El. R. Co., 2 Dauph. Co. Rep. 316, 23 Pa. Co. Ct. 262.

18. Union City R. Co. v. Saginaw, 113 Mich. 694, 4 Det. Leg. N. 455, 71 N. W. 1073.

19. Tower v. Tower & S. St. R. Co., 68 Minn. 500, 38 L. R. A. 541, 71 N. W. 691.

20. Hyer v. Richmond Traction Co., 168 U. S. 471, 42 L. Ed. 547.

### CHAPTER III.

#### **Acquisition; and herein of Eminent Domain; Rights of Abutting Owners; Securing Use of Other Tracks, Crossings, Bridges, Etc.**

- SECTION I.**
1. Unauthorized use of highway a nuisance.
  2. Rights of public and abutting owners in streets.
  3. Taking of abutting owners' property.
  4. Remedies of abutting owners.
  5. Eminent domain.
  6. Proceedings to ascertain compensation.
  7. Compensation.
  8. Consolidation.
  9. Use of tracks of other roads, and traffic arrangements.
  10. Crossing other tracks.
  11. Use of turnpikes, bridges, etc.
  12. Motive power.

**§ 1. Unauthorized use of highway a nuisance.**—The construction or operation of a railroad in a public street or highway, without the consent of the "local authorities," is a nuisance.<sup>1</sup> Redress against such a nuisance is had by indictment,<sup>2</sup> by action instituted by the municipality, or authorities having charge of the highway,<sup>2</sup> or by proceedings

<sup>1</sup>*½. Burlington v. Pa. R. Co.* (Ch.), 56 N. J. Eq. 259, 38 Atl. 849.

<sup>2</sup>*I. Commonwealth v. Old Colony, etc., R. Co.*, 14 Gray (Mass.), 93; *Pittsburgh, etc., R. Co. v. Commonwealth*, 101 Pa. St. 192, 10 Am. & Eng. R. Cas. 321; *State v. Louisville & N. R. Co.*, 91 Tenn. 445, 19 S. W. 229; *Larimer, etc., Ry. Co. v. Larimer St. Ry. Co.*, 137 Pa. St. 533; *State v. Ohio River R. Co.*, 38 W. Va. 242, 18 S. E. 582, 56 Am. & Eng. R. Cas. 641.

<sup>2</sup>*Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Stamford v. Stamford Horse R. Co.*, 56 Conn. 381, 36 Am. & Eng. R. Cas. 140; *Mc-*

*Cartney v. Chicago, etc., R. Co.*, 112 Ill. 611, 29 Am. & Eng. R. Cas. 326; *Hunt v. Chicago Horse, etc., R. Co.*, 121 Ill. 638, 13 N. E. 176; *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63.

If there is a variance from the charter route of an electric railway greater than is necessary, or the charter itself is open to objection, the Commonwealth alone can raise the question, and not an abutting owner who seeks to enjoin the construction of the road. *Minnick v. Lancaster, etc., R. Co. (Pa. C. P.)*, 24 Pa. Co. Rep. 312, 7 North. Co. 305.

at the instance of the attorney-general.<sup>3</sup> An abutting owner, having suffered material special damage, distinct in character from that which the public suffers, and irreparable in character, can have the assistance of equity by injunction to restrain the creation or maintenance of such a nuisance; or he may maintain the ordinary action at law to abate the same; damages may also be recovered.<sup>4</sup> But if permission

3. Attorney-General v. Lombard, etc., Ry. Co., 10 Phila. (Pa.) 352.

4. Thomas v. Inter-Co. St. Ry. Co., 5 Am. Electl. Cas. 175, 167 Pa. St. 120; Gen. El. Ry. Co. v. Chicago, etc., Co., 90 Fed. 907, 39 C. C. A. 345; Blesch v. Chicago, etc., Ry. Co., 43 Wis. 183; Cain v. Chicago, etc., R. Co., 54 Iowa, 255, 3 N. W. 736; Strange v. Hill, etc., Ry. Co., 54 Iowa, 669, 7 N. W. 115; Grand Rapids, etc., R. Co. v. Heisel, 47 Mich. 393, 11 N. W. 212.

Injunction is the proper remedy of an abutting owner to prevent the construction of an electric street railway until compensation is made to him. If however the road is already built without his opposition and without compensation to him, the operation will not be enjoined, but he will be relegated to his action at law for damages. Pa. Ry. Co. v. Mont. Co. Pass. Ry. Co., 5 Am. Electl. Cas. 166, 167 Pa. St. 62.

Where the city owns the fee of the street for the public use, an injunction will not be granted to an abutting owner to restrain the laying of a street railway, on the ground that it will impair his easement of ingress and egress. He has a remedy in damages. Has-

kell v. Denver Tramway Co. (Colo. Sup. Ct.), 6 Am. Electl. Cas. 151, note, 46 Pac. 121.

The owners of the fee simple of land in a street may prosecute a certiorari to test the legality of a municipal ordinance purporting to authorize a railway company to place rails, poles, and wires on their land in the street. State v. Jersey City (N. J. Sup.), 5 Am. Electl. Cas. 146.

An abutting property-owner is not entitled to enjoin the construction of a street railroad because his property would be injuriously affected or damaged thereby, or because the railroad is not legally authorized. General El. Ry. Co. v. Chicago, etc., Co., 184 Ill. 588, 56 N. E. 963.

Where an abutting owner upon a street has given consent to the construction of a railroad, such consent, so far as his special property right was affected, operates to make the construction of the road lawful as to him; and hence he is not entitled to a permanent injunction to restrain the construction. Bellew v. N. Y., etc., Co., 47 App. Div. (N. Y.) 447, 62 N. Y. Supp. 242.

A taxpayer, as such, cannot institute proceedings to declare void a street railway grant because the

of the township authorities to build and operate the road upon the highway has been obtained, the abutting owner cannot maintain an action to prevent the building and operation of the railroad, because the required consent of property-owners is lacking.<sup>5</sup> If railroad tracks are unlawfully laid in the street, the local authorities controlling the street may remove them by force; nevertheless, the right so to do does not constitute that adequate remedy at law which excludes equitable relief.<sup>6</sup> If a company has a franchise to lay a railway to be operated by one motive power only, and constructs its road for the use of an entirely different power, the local authorities cannot abate the road as a nuisance; but they may compel the company to operate it by the authorized motive power.<sup>7</sup> The term, "local authorities" with

necessary consents of abutting owners have not been obtained, but such action can be brought only by an abutting owner. *Glidden v. Cincinnati* (Cin. Sup. Ct.), 4 Ohio Dec. 423.

Preliminary injunction to prevent construction of electric street railway on plaintiff's land will not be permitted unless it clearly appears that the construction is to be upon his land. *Thouron v. Railway Co.* (Pa. Sup. Ct.), 6 Am. Electl. Cas. 150.

5. *Borden v. Atlantic, etc., El. Ry. Co.* (N. J. Ch.), 5 Am. Electl. Cas. 179. Where a trolley company has not obtained the consents required by statute to authorize it to construct its road, an abutting owner is not liable for filling up a trench dug in a street upon his premises. *Wheeler v. Pa. R. Co.*, 194 Pa. St. 539, 45 Atl. 338; *People v. City of Utica*, 45 App. Div. (N. Y.) 356, 61 N.

Y. Supp. 31. If an abutting owner does not own the fee in the street, although special damage has resulted to him by the construction of the railroad without the necessary consents, it rests within the discretion of the court either to grant an immediate injunction in his suit therefor, or to give the railroad company a reasonable time within which to obtain such consents. *Black v. Brooklyn, etc., R. Co.*, 32 App. Div. (N. Y.) 468, 53 N. Y. Supp. (87 St. Rep.) 312.

6. *Stamford v. Stamford H. R. Co.*, 56 Conn. 381, 36 Am. & Eng. R. Cas. 140. If track is laid in good faith, and without objection from local authorities having full knowledge, the act cannot be classed among the nuisances to be summarily abated. *Easton, etc., Ry. Co. v. Easton*, 133 Pa. St. 505.

7. *Spokane St. R. Co. v. Spo-*

whose consent street railroad companies are authorized to construct a railroad along streets or highways, refers to the officers of the city, town, or village, having control of the highways generally within the municipality.<sup>8</sup>

**§ 2. Rights of public and abutting owners in streets.**— Ordinarily, and in fact wherever land is taken for highway purposes according to the course of the common law, the title to the soil over which highways and streets are laid, remains in the owner of the fee, subject only to the public easement.<sup>9</sup> The right of the public in a highway consists in the privilege of passage, and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains, and lay gas and water pipes; the subordinate privileges are entirely consistent with the primary use of the highway, and are no detriment to the landowner.<sup>10</sup> In deciding a recent case in the New York Court of Appeals, Judge HAIGHT, in the prevailing opinion, said: “The primary object of highways is for the public travel by persons and animals, and by carriages or vehicles used for the transportation of persons and goods, other than by railroads.”<sup>11</sup> Substantially all the courts of last resort in the United States, except the New York Court of Appeals, include also the carriages and vehicles used upon the ordinary street surface railroads among the means of accomplishing the primary object of

Kane Falls, 6 Wash. 521, 33 Pac. 1072.

8. *Re Rochester El. R. Co.*, 123 N. Y. 351, 46 Am. & Eng. R. Cas. 157, 33 St. Rep. (N. Y.) 695, 25 N. E. 381.

9. *State, Roebling v. Trenton Pass. R. Co.*, 6 Am. Electl. Cas. 137, 58 N. J. L. (29 Vroom) 666,

33 L. R. A. 129, 4 Am. & Eng. R. Cas. (N. S.) 392, 34 Atl. 1091; *McCruden v. Rochester Ry. Co.*, 5 Misc. Rep. (N. Y.) 59.

10. *State v. Laverack*, 5 Vroom (N. J.), 206.

11. *Palmer v. Larchmont El. Co.*, 158 N. Y. 231, 235, 52 N. E. 1092.

highways. And it is quite uniformly held that a railroad, constructed and operated in the street of a city, so as not to materially interfere with its common use for public travel by ordinary modes, or with private rights of abutting land-owners, for the purpose of transporting persons from place to place upon such street at their reasonable convenience, whatever the motive power may be, is not an additional burden upon the fee thereof, and really promotes the primary object of the highway. The ordinary electric street railway with its trolley wire supported by cross-wires attached to poles set near the outer edge of the sidewalks, with due regard to the abutting property-owners' convenience, is but an improved method of using the street for public travel. There is no limit to the public right to use a street, and every part of it, so long as that use is in aid of public travel thereon and does not interfere unnecessarily with the common use of the way by ordinary modes of travel, and is no substantial impairment of private rights of property. Compared with a horse car, the electric car more certainly promotes the primary object of the highway. It moves more rapidly, is started and stopped with greater facility, and will more comfortably, and without obstructing the streets as much for travel by other means, move the greater number of persons the greater distance in a given time.<sup>12</sup> Whether the like

12. *La Crosse City R. Co. v. Higbee*, 7 Am. Electl. Cas. 369, 107 Wis. 389, 51 L. R. A. 923, 929, 83 N. W. 701. And see *Briggs v. Lewiston & A. Horse R. Co.*, 79 Me. 363, 10 Atl. 47; *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 7 L. R. A. 205, 19 Atl. 326, 7 Ry. & Corp. L. J. 385, 43 Am. & Eng. R. Cas. 208; *Williams v. City*

Electric St. R. Co. (C. C. E. D. Ark.), 41 Fed. 556, 7 Ry. & Corp. L. J. 448, 43 Am. & Eng. R. Cas. 215; *Nichols v. Ann Arbor & Y. St. R. Co.*, 87 Mich. 361, 16 L. R. A. 371, 49 N. W. 538; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380, 20 Atl. 859, 46 Am. & Eng. R. Cas. 76; *Lockhart v. Craig St. R. Co.*, 3 Am. Electl.

railroad, upon a country public road, imposes a servitude in addition to that charged upon the lands by the original

Cas. 314, 139 Pa. St. 419, 21 Atl. 26, 9 Ry. & Corp. L. J. 183; Cincinnati Inclined Plane R. Co. v. City & Suburban Teleg. Assn., 48 Ohio St. 390, 12 L. R. A. 534, 27 N. E. 890; Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 4 Am. Electl. Cas. 202, 95 Ky. 50, 23 S. W. 592; Dean v. Ann Arbor St. R. Co., 93 Mich. 330, 53 N. W. 396; Ogden City R. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288; Howe v. West End St. R. Co., 167 Mass. 46, 44 N. E. 386; Birmingham Traction Co. v. Birmingham R. & Electric Co., 119 Ala. 137, 43 L. R. A. 233, 24 So. 502; Chicago, B. & Q. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008; Cumberland Teleg. & Teleph. Co. v. United Electric R. Co., 93 Tenn. 492, 27 L. R. A. 236, 29 S. W. 104; Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 560; Poole v. Falls Road El. R. Co., 88 Md. 533, 41 Atl. 1069; State, Roebling v. Trenton Pass. R. Co., 6 Am. Electl. Cas. 137, 58 N. J. L. (29 Vroom) 666, 33 L. R. A. 129, 4 Am. & Eng. R. Cas. (N. S.) 392, 34 Atl. 1090; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; State, Jacksonville v. Jacksonville St. R. Co. (Fla.), 10 So. 590; Koch v. North Ave. R. Co. (Md.), 4 Am. Electl. Cas. 153, 15 L. R. A. 377, 23 Atl. 463; Heilman v. Lebanon & A. R. Co., 145 Pa. St. 23, 23 Atl. 389, 1 Pa. Adv. Rep. 161; Schaaf v. Cleveland, M. & S. El. R. Co., 16 Ohio C. C. 252, 8 O. C. D. 688; Sydney Munic. Coun. v. Young (P. C. 1898), A. C. 457, 78 L. T. Rep. 365, 67 L. J. P. C. (N. S.) 40; Snyder v. Fort Madison St. R. Co., 105 Iowa, 284, 41 L. R. A. 345, 11 Am. & Eng. R. Cas. (N. S.) 53, 75 N. W. 179; Placke v. Union Depot R. Co., 140 Mo. 634, 41 S. W. 915; Patterson v. Pittston (Pa. C. P.), 8 Kulp (Pa.), 530; Merrick v. Intramontaine R. Co., 118 N. C. 1081, 24 S. E. 667; Limburger v. San Antonio R. T. St. R. Co. (Tex.), 30 S. W. 533; State, Kennelly v. Jersey City (N. J. Sup.), 5 Am. Electl. Cas. 146, 26 L. R. A. 281, 30 Atl. 531; West Camden R. Co. v. Camden, etc., R. Co. (N. J. Ch.), 29 Atl. 423; People, Kunze v. Ft. Wayne & E. R. Co., 92 Mich. 522, 16 L. R. A. 752, 52 N. W. 1010; Paterson R. Co. v. Grundy (N. J. Ch.), 4 Am. Electl. Cas. 173, 26 Atl. 788; Elfelt v. Stillwater St. R. Co. (Minn.), 55 N. W. 116; Detroit City R. Co. v. Mills, 85 Mich. 638, 48 N. W. 1007, 46 Am. & Eng. R. Cas. 608, 10 Ry. & Corp. L. J. 104; Ransom v. Citizens' R. Co. (Mo.), 16 S. W. 416; Van Horne v. Newark Pass. R. Co. (N. J.), 21 Atl. 1013, 14 N. J. L. J. 199, 33 Cent. L. J. 69, 10 Ry. & Corp. L. J. 234; Finch v. Riverside & A. R. Co., 87 Cal. 597, 9 Ry. & Corp. L. J. 250, 46 Am. & Eng. R. Cas. 107, 25 Pac. 765; Newark Pass. Co. v. Block, 55 N. J. L. 605; State, Kennelly v. Jersey City (N. J.), 5 Am. Electl. Cas. 146; Green v. Railway Co. (Md. Ct. App.), 4

taking for a public highway, entitling the owner of the fee to an additional compensation, appears yet to be an un-

Am. Electl. Cas. 206, 28 Atl. 626; Simmons v. Toledo, 5 Am. Electl. Cas. 152, 8 Ohio C. C. 535; Doane v. Lake St. El. R. Co., 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520; Southern Ry. Co. v. Atlanta, etc., Ry. Co., 111 Ga. 679, 36 S. E. 873. In the case last cited, it was held that expressly restricting a railroad company to the use of electricity as a motive power, when its charter authorized it to use steam also, did not add to the servitude imposed on the street. And see General El. Ry. Co. v. Chicago, etc., R. Co., 184 Ill. 588, 56 N. E. 963.

An abutting owner suffering special damage may, under the Illinois Const. 1870, art. II, § 13, providing that private property shall not be taken or damaged for public use without compensation, recover, although an elevated railroad built in the street for the transportation of passengers from place to place, is not an additional servitude thereon. Chicago Office Bldg. v. Lake St. El. Ry., 87 Ill. App. 594.

Laying an electric street-car track on a turnpike within about seven feet of a building does not entitle the abutting owner to compensation, although it prevents teams from standing, as formerly, in front of his place of business. Ashland & C. St. R. Co. v. Faulkner, 21 Ky. L. Rep. 151, 43 L. R. A. 554, 45 S. W. 235, 10 Am. & Eng. R. Cas. (N. S.) 223; modified on rehearing, 21 Ky. L. Rep. 156, 51 S. W. 806.

A change of grade by erecting a viaduct, the surface of which becomes the surface of the street, and thus totally cutting off light, air, and access from abutting property is not a taking within the meaning of a constitutional provision as to compensation, the viaduct being made by the municipal authority, and in the exercise of its power to change the grade, though under an agreement by which the railroad companies whose tracks are to be within the viaduct, are to contribute toward the expense. Selden v. Jacksonville (Fla.), 14 L. R. A. 370, 10 So. 457.

The uses of streets prevailing at the time of taking or dedicating a street do not limit the public right. They are not the only uses which the owner of the soil is deemed to have contemplated. Such uses may be enlarged and may include all the additional and improved methods of obtaining the same objects and enjoying the same privileges, not however to the denial or substantial impairment of the abutting owner's use and enjoyment of the fee of the highway to the center thereof, subject to the public easement therein. Magee v. Overshiner, 150 Ind. 127, 40 L. R. A. 370, 49 N. E. 951.

Where the tracks are not laid on the established grade, an additional servitude is imposed. Sherlock v. Kansas City Belt R. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551.

The conversion of an existing single-track horse railway into a double-track electric road under legislative authority and with municipal consent is not an additional servitude. *Reid v. Norfolk City R. Co.*, 94 Va. 117, 36 L. R. A. 274, 26 S. E. 428.

The permission to a street railroad company to lay its tracks in a street already appropriated to public use is not the grant of the right to appropriate an additional easement in the soil of the street, but merely a mode of facilitating existing travel by adding an additional mode of conveyance to those already upon the street. Owner of the fee of the street cannot complain. *Chicago, etc., R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008.

An owner of the soil has no new servitude imposed upon him by a railroad on a street for transporting freight and passengers, although he may be entitled to damages for injury to his right of access, or light, or air. *Montgomery v. Santa Ana & W. R. Co.*, 104 Cal. 186, 25 L. R. A. 654, 10 Am. R. & Corp. Rep. 25, 43 Am. St. Rep. 89, 37 Pac. 186.

A lease by a railroad company to other companies of the right to use its tracks for terminal facilities imposes no additional servitude. *Miller v. Green Bay, etc., R. Co. (Minn.)*, 26 L. R. A. 443, 60 N. W. 1006.

The right of the abutting owners to compensation for impairment of their easement of light, air, and access in the street by the construction of a railroad thereon is not affected by the fact that the

construction is authorized by an act of the legislature. *New Mexican R. Co. v. Hendricks*, 6 N. M. 611, 30 Pac. 901. As to steam railroads upon the street, see *Henry Gaus & Sons Mfg. Co. v. St. Louis, etc., R. Co.*, 113 Mo. 308, 18 L. R. A. 339, 7 Am. R. & Corp. Rep. 235, 20 S. W. 658.

The construction of a private railroad for an exclusively private use can no more be made on that portion of an owner's land occupied by a public railroad than on any other portion of his estate. *Bradley v. Pharr*, 45 La. Ann. 426, 19 L. R. A. 647, 12 So. 618.

Poles for an electric street railway must not be so placed as to interfere unnecessarily with the right of abutting owners to use and enjoy their property. *Snyder v. Fort Madison St. Ry. Co.*, 7 Am. Electl. Cas. 359, 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345, 11 Am. & Eng. R. Cas. (N. S.) 53; *McDermott v. Warren, etc., Ry. Co. (Mass.)*, 7 Am. Electl. Cas. 367.

An abutter, owning to the middle of the street, can use the writ of certiorari to test the validity of an ordinance which purports to confer the power to place poles whereon to stretch wires for an overhead trolley system. *State, Green, Pros. v. Trenton*, 4 Am. Electl. Cas. 30, 54 N. J. L. 92.

The filing by an owner of land of a consent for the construction of a street railway upon the street upon which the land abuts does not estop the one signing the consent to claim that no consent was given for the construction in front of other lands subsequently purchased by him. *Taylor v. Erie*

settled question.<sup>13</sup> There seems to be no reason for distinction in this regard between a country road and a city street, unless it be that a highway primarily is not for the purpose of facilitating intercourse between places, separated by a considerable distance, but for the purpose of aiding abutting owners to have ready access to property upon the same street. Therefore, at the time of the original taking for the highway, the abutting owner had taken from him the right to public use of the way in any mode whatever to facilitate intercourse along and upon the street, whether the method was then known or not; but as to intercourse between places not upon the highway, and between which the highway was a connecting link, the public use was limited to the common

City Pass. R. Co., 186 Pa. St. 120,  
40 Atl. 316.

But see to the contrary, Jaynes v. Omaha St. R. Co., 7 Am. Electl. Cas. 328, 53 Nebr. 631, 39 L. R. A. 751, 74 N. W. 67; East End St. R. Co. v. Doyle, 88 Tenn. 747, 9 L. R. A. 100, 13 S. W. 936; Stange v. Dubuque, 62 Iowa, 303, 17 N. W. 518.

A statute authorizing selectmen to assess the damages suffered by abutting owners on account of the construction of lines for the "transmission of intelligence by electricity" and of "electric light and electric power lines," does not affect electric railway lines. McDermott v. Warren, etc., St. Ry. Co. (Mass.), 7 Am. Electl. Cas. 367.

13. Ehret v. Camden & T. Ry. Co. (N. J. Ch.), 7 Am. Electl. Cas. 383, 46 Atl. 578; Zehren v. Milwaukee El. R. & L. Co., 7 Am. Electl. Cas. 345, 99 Wis. 83, 67 Am. St. Rep. 844, 74 N. W. 538,

41 L. R. A. 575; Fidelity Ins. T. & S. D. Co. v. Philadelphia & B. Pass. R. Co. (C. P.), 6 Pa. Dist. 737.

A street railroad may be maintained on a highway as against an abutting owner, providing it does not infringe the Maine statute requiring highways to be maintained "so as to be safe and convenient for travelers with horses, teams, and carriages." Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 560; Pa. R. Co. v. Mont. Co. Pass. R. Co., 5 Am. Electl. Cas. 166, 167 Pa. St. 62, 31 Atl. 468, 36 W. N. C. 153, 27 L. R. A. 766.

An electric passenger railroad upon a country highway, whether or not the railroad be interurban, constitutes an additional burden which entitles the abutting owner to compensation for injuries sustained. Zehren v. Milwaukee El. Ry. & L. Co., *supra*, 7 Am. Electl. Cas. 345.

methods of locomotion, by which the traveler could readily move upon any part of the highway, and had no unusual or exclusive privilege thereon.<sup>14</sup> Whether or not the abutting owner owns to the middle of the street, subject to the public easement therein, affects the question but little, except in New York. Nearly all the authorities agree that if he does not own the fee in any part of the street, he is entitled to damages and an injunction, when the street is practically and substantially closed against him for ordinary street purposes, under the authority of the municipality owning the fee, as by a railroad embankment therein, several feet high, with perpendicular stone walls, leaving a space only eight or nine feet wide for a carriage.<sup>15</sup> But even if he own the fee

14. In Wisconsin it is held that an electric railroad in a village street, forming part of a connecting line between cities for the conveyance of passengers, and also personal baggage, mail, express matter, and merchandise, constitutes an additional servitude for which abutting owners are entitled to compensation. Chicago & N. W. R. Co. v. Milwaukee, etc., R. Co., 95 Wis. 561, 37 L. R. A. 856, 70 N. W. 678.

15. Reining v. N. Y., L. & W. R. Co., 128 N. Y. 157, 14 L. R. A. 133, 40 St. Rep. (N. Y.) 392, 28 N. E. 640, 10 Ry. & Corp. L. J. 462; Egerer v. N. Y. C. & H. R. R. Co., 130 N. Y. 108, 14 L. R. A. 381, 41 St. Rep. (N. Y.) 488, 29 N. E. 95; Martin v. Chicago, S. F. & C. R. Co., 47 Mo. App. 452; Onset St. R. Co. v. Plymouth Co. Comrs., 154 Mass. 395, 28 N. E. 286; Jones v. Erie & W. Va. R. Co., 144 Pa. St. 629, 23 Atl. 251,

29 W. N. C. 167, 1 Pa. Adv. Rep. 98; Highland Ave. & B. R. Co. v. Matthews (Ala.), 14 L. R. A. 462, 10 So. 267, 34 Cent. L. J. 158; Wead v. St. Johnsburg & L. C. R. Co. (Vt.), 24 Atl. 361; Lockwood v. Wabash R. Co., 122 Mo. 86, 24 L. R. A. 516, 26 S. W. 698; Johnson v. Old Colony R. Co. (R. I.), 29 Atl. 594.

For an injury, due to obstruction of the easement of light, air, or access to his property, or to vibrations caused by running heavy cars at a great speed, the abutting owner has his remedy at law and should be remitted thereto. State v. Railroad Co., 6 Am. Electl. Cas. 137, 58 N. J. 666.

Nothing can be claimed on the ground that city railroads are a great public convenience and benefit; if they are so, the public can afford to pay for them; that is certainly no reason why individual property should be taken for pub-

to the center of the street, and there are shade trees in the street and upon that portion of which he owns the fee, a traction company, authorized by the city to erect its trolleys in the street, may top the branches of the trees where they overhang the street in such a manner as to make the cutting reasonably necessary for the passage of its wires. The boughs are subject to removal by the municipal authorities whenever the public exigency or convenience requires it, and the authority to extend the wires along the street involves, by implication, the competency to do whatever is reasonably necessary to effect the end in view.<sup>16</sup> It may remove shade trees within the limits of the public highway, for the construction of its road as established by the township authorities without compensating the abutting owner for damages, provided it gives notice to the owner that the removal of the trees is necessary for its purposes and an opportunity to remove them as he may see fit.<sup>17</sup> It may be

lic use. *Hinchman v. Paterson Horse R. Co.*, 2 C. E. Green (N. J.), 75, 80.

Where the trolley track is laid in conformity to the direction of a special ordinance, the company will not be restrained from operating it because its location works inconvenience and injury to the abutting owners, since, if the municipality has so unreasonably appropriated the divisions of the highways as to injure abutting owners, their remedy is in the courts of law which supervise inferior jurisdiction, and not in equity. *Budd v. Camden Horse R. Co.* (N. J. Ch.), 48 Atl. 1028.

A railroad company organized under How. (Mich.) Annot. Stat., chap. 94, providing for "train" or

street railways, cannot occupy a highway and construct thereon a railroad, not conforming to the surface of the highway, but having cuts and fills with trenches at the side of the roadbed and using a "T" rail, although authorized so to do by the town authorities, without compensation to abutting owners. *Nichols v. Ann Arbor & Y. St. R. Co.*, 87 Mich. 361, 16 L. R. A. 371, 49 N. W. 538.

16. *Dodd v. Consolidated Traction Co.* (N. J. Sup.), 3 Am. Electl. Cas. 201, 57 N. J. L. 482, 31 Atl. 980.

17. *Miller v. Detroit, Y. & A. A. Ry. Co.* (Mich. Sup. Ct.), 7 Am. Electl. Cas. 387, 51 L. R. A. 955. In the case cited, the court, per GRANT, J., said: "It is estab-

difficult to justify the use of the streets for through trains made up of a motor car and trailers, with instructions to the company's employees not to carry local passengers, upon

lished beyond controversy that the municipal authorities have entire control over their highways, streets, and sidewalks, and may remove shade trees whenever they are an obstruction to the use of the highway for public travel, without compensation to the owner. *Vanderhurst v. Tholcke*, 113 Cal. 147, 36 L. R. A. 267, 45 Pac. 266; *Everett v. Council Bluffs*, 46 Iowa, 66; *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380. It is true that these trees were lawfully planted, and that they are the private property of the abutting owner. It is also true that one planting trees in the public highway plants them with the understanding that they can remain there only so long as the space occupied by them is not required for public use. These roads are not an additional servitude as we have repeatedly held. When therefore their construction is duly authorized, it logically follows that the company has the right to remove from the highway any object which interferes with the proper construction and operation of the road. Such power is necessarily implied. *Dodd v. Consolidated Traction Co.*, 57 N. J. L. 482, 31 Atl. 980; *Southern Bell Teleph. Co. v. Francis*, 109 Ala. 224, 31 L. R. A. 193, 19 So. 1. When a man dedicates his land for a public highway, or it has been condemned for that purpose, and he has been compensated, it is defi-

nitely understood by him that whatever he may lawfully do within the boundaries of the highway, is done with the right of the lawful authorities to appropriate the entire width of the highway for purposes of travel, if it shall become necessary. Street railways, in city and country, have come to be regarded as a public necessity and their construction upon the highways universally sanctioned. If the township authorities may remove any obstruction to the public use, there seems to be no sound reason why they may not authorize street railway companies, telephone companies, and the like to do so, when such companies are lawfully entitled to the use of the streets. It is conceded that the township authorities in this case were authorized to grant the franchise to the defendant, and to determine in what part of the highway its road should be constructed. The township may possibly fix, as a condition of the grant, the payment of damages for the destruction of the shade trees. The legislature undoubtedly has the power to provide that abutting owners should be compensated for the damage which must result to them from the destruction of their trees. That however is a matter for the determination of the legislature and not for the courts. The legislature has granted the power to do it without compensation. The township

the theory upon which the use of streets for street railways has been justified, as a legitimate use.<sup>18</sup>

**§ 3. “Taking” of abutting owners’ property.**—As has been already stated, every, or nearly every, State, by constitutional provision, or otherwise, prohibits the taking of private property for public use without compensation, and the laying of railroad tracks in the streets without the consent of the local authorities and a majority of the property-owners.<sup>19</sup> Whether

have not provided for it. Courts are therefore powerless. But there is one fatal defect in the defendant’s proceedings. It secured no greater rights by its franchise than the municipality had. The law gives neither the right to remove shade trees without notice to the owner and an opportunity given him to remove them as he sees fit. *Clark v. Dasso*, 34 Mich. 86. Under that decision plaintiff was entitled to recover for damages and the judgment must therefore be affirmed.

18. *West Jersey R. Co. v. Camden, etc., Ry. Co.*, 5 Am. Electl. Cas. 137, 52 N. J. Eq. 31; *Aycock v. San Antonio Brewing Assn.* (Tex. Civ. App.), 63 S. W. 953.

19. These constitutional provisions have uniformly been liberally construed for the protection of private property. Not only an actual taking, but also the destruction of private property, either total or partial, or the diminution of its value by the act of the government, directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking, within the constitutional provision, which can

only be exercised under the right of eminent domain, and just compensation made. *Trenton Water Power Co. v. Rath*, 7 Vroom (N. J.), 335; *Pa. R. Co. v. Angle*, 14 Stew. Eq. (N. J.) 316, 329.

The Constitutions of the several States, almost without an exception, prevent the legislature from granting to a railroad the right to use a public highway as the bed of its railroad without compensation to the owner of the soil. See *Star v. Camden & Atl. R. Co.*, 4 Zabr. (N. J.) 592; *Hinchman v. Paterson Horse R. Co.*, 2 C. E. Green (N. J.), 75. In the latter case, Chancellor GREEN, in his opinion, distinguished the use of a street for a horse railroad from its use by an ordinary railroad, and justified the use of part of the highway for street railroads and the change from horse power to electricity without compensating the owner in this language: “They are ordinarily, as in this case, required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or permitted. The use of the road is

or not the construction and operation of a street railroad in a street, in which the abutting owners have the fee to the center, is an additional servitude, and so a taking is, except in New York, largely a question of fact, dependent upon the character of the road and its construction. All the courts substantially agree that the use of a street for other than legitimate purposes, which constitutes any impairment of the easements of an abutting owner, is a taking of his property, within the meaning of the Constitution.<sup>20</sup> In New

nearly identical with that of the ordinary highway. The motive power is the same. The noise and traffic of the street by the cars is not greater, and ordinarily less, than that produced by omnibuses and other vehicles in ordinary use. A change in the motive power of such cars did not necessarily occasion any injurious effects upon the abutting property. Cars of the same pattern and size of the cars used by the company as a horse railroad and driven with no greater speed, might have been adapted to the new motive power; therefore the substitution of electric motors with the trolley system, for horses on street railroads does not *per se* create an additional easement." State v. Railroad Co., 6 Am. Electl. Cas. 137, 5 N. J. 666, *supra*.

If the acts done under color of the ordinance or the statute be found to be an unlawful infringement of the rights of private property, an action will lie in which neither the ordinance or the statute would be a justification. Costegan v. Pa. R. Co., 25 Vroom (N. J.) 234.

20. Willamette Iron Works Co.

v. Oregon R. & Nav. Co., 26 Oreg. 224, 37 Pac. 1016; Sherlock v. Kansas City Belt R. Co., 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629. In the case last cited it was held that a franchise for the construction of a railroad switch through an alley in a city to connect with the main line is for a public and not a private purpose, notwithstanding that private parties are served thereby, where they have no control or management of the cars or the business of transportation. And see St. Louis, O. M. & S. R. Co. v. Petty, 57 Ark. 359, 20 L. R. A. 435, 21 S. W. 884; Butte, A. & P. R. Co. v. Montana Union R. Co., 16 Mont. 504, 31 L. R. A. 298, 41 Pac. 232; Brown v. Chicago G. W. R. Co., 137 Mo. 529, 38 S. W. 1099; White v. Northwestern N. C. R. Co., 113 N. C. 610, 22 L. R. A. 627, 56 Am. & Eng. R. Cas. 706, 18 S. E. 330; Spencer v. Met. St. R. Co., 120 Mo. 154, 22 L. R. A. 668, 23 S. W. 126; Potts v. Quaker City El. R. Co. (Pa. C. P.), 3 Pa. Dist. 172, 11 Lanc. L. Rev. 81; affd., 161 Pa. St. 396, 34 W. N. C. 261, 11 Lanc. L. Rev. 204, 29 Atl. 108.

York the question was settled many years ago, beyond peradventure, and conclusively, that the construction of a steam railroad across a highway, and in the ordinary way in which such roads are constructed and carried on, is an appropriation of the highway for a new and distinct purpose, entirely foreign to its original object, and which entitles the owner to compensation.<sup>21</sup> And the same rule is made applicable, in that State, to street surface railways.<sup>22</sup>

In the case last cited it was held that the abutting owners were entitled to have their compensation in damages secured first, before the company would be permitted to go on with the construction of an elevated road in the streets.

A horse railway may not be laid in a city street solely as a freight transfer track between two steam railroads running into the city, without compensation to the adjoining landowners; and this is so although the street is on land made by filling in below low-water mark in a navigable river or lake. *Carli v. Stillwater St. R. & Transfer Co.*, 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205.

One purchasing land abutting on a street upon which a railroad had previously been constructed under a license by city council, subject to the rights of abutting owners, is entitled to recover from the company notwithstanding a failure by his grantor to assign his cause of action for the damages to the premises caused by its construction and operation during the time he owned the land prior to the action which had not been barred by limitation. *Hoffman v. Flint & P. M. R. Co.*, 114 Mich. 316, 9

Am. & Eng. R. Cas. (N. S.) 447, 72 N. W. 167, 4 Det. Leg. N. 590, 30 Chic. Leg. N. 107.

The constructing of a railroad, with the consent of the local authorities, in a street sixty feet wide, is not such an interference with access to the property of an abutting owner, which at the nearest point is twenty-five feet from the track, as to entitle him to damages. *Kansas, N. & D. R. Co. v. Mahler*, 45 Kan. 565, 26 Pac. 22.

21. *The Trustees of the Presbyterian Society in Watertown v. The Aub. & Roch. R. Co.*, 3 Hill (N. Y.), 567; *Fletcher v. The Aub. & Syr. R. Co.*, 25 Wend. (N. Y.) 462; *Williams v. N. Y. C. & H. R. R. Co.*, 16 N. Y. 97; *Davis v. Mayor*, 14 id. 506; *Mahon v. N. Y. C. R. Co.*, 24 id. 658; *Carpenter v. Same*, id. 655; *Wager v. Troy Union R. Co.*, 25 id. 526.

22. *Craig v. Rochester, etc., R. Co.*, 39 N. Y. 404. In *Wager v. Troy Union R. Co.*, 25 id. 526, the court, referring to the distinction claimed to exist between roads operated by steam and others by horse power, said per SMITH, J.: “With a single track, and particularly if the cars used upon it were propelled by horse power,

The argument is, that a street surface railroad company acquires a property right in the street, and may use a por-

the interruption of the public easement in the street might be very trifling, and of no practical consequence to the public at large. But this consideration cannot affect the question of the right of property, or the increase of burden upon the soil. It would present simply a question of *degree* in respect to the enlargement of the easement, and would not affect the principle that the use of a street for the purpose of a railroad, imposed upon it, is a new burden." In the Craig Case, *supra*, the court, per MILLER, J., in the prevailing opinion, said: "The ground upon which these cases are decided is, that the use of the land for a railroad imposes an additional burden upon the owner of the fee. I am at loss to see any apparent distinction in the application of the rule between cases where steam power is employed, and those cases where the road is operated by horse power. It is true there is some difference in the manner in which the road is constructed, and in the speed with which its cars are propelled, at times; but there is precisely the same exclusive appropriation of the track for the purposes intended in each case, to the absolute exclusion of all who may interfere with its mode of operation. The power to use the road for the conveyance of passengers is entirely with the company, and no person can interfere with that method of conveyance, or with the right of the company to enjoy its monopoly. As was

held in Hogan v. Eighth Ave. R. Co., 15 N. Y. 380, the company has the exclusive right of the tracks while the cars are passing, and all others must keep out of their way, and if a party is injured while they are proceeding at a reasonable and lawful rate of speed, an action cannot be maintained against the company for the injury. This privilege of laying and using the tracks in such a manner confers upon the company a right to the use and enjoyment of the track which precludes other vehicles while the operations of the company in the use of the track demand their exclusion. Such a right is, I think, inconsistent with the nature of the easement acquired by the public. In Williams v. N. Y. C. R. Co., SELDEN, J., after stating the distinction between the two uses to which the highway is applied by converting it into a railroad track, proceeds to argue, that by means thereof two easements are created, one vested in the public which has been paid for, and the other in the company, and remarks: 'These easements are property and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be that it is carried out and is part of the public easement, and is therefore a gift of the public. This would do if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and of the owner of the fee.'

tion thereof almost exclusively, and that the public did not have such a property right to give without the consent of

Ought not the latter to have been consulted?' There is much force I think, in these suggestions, and it is difficult to see how they can be answered satisfactorily and according to any well-settled legal principle. If the reasoning of the learned judge is correct, then the same rule is applicable to each class of railroads, the difference in the use being only in the degree. 25 N. Y. 533.

“The use of a railroad, no matter how it is operated, whether by horse or steam power, necessarily includes, to a certain extent, an exclusive occupation of a portion of the highway, for the track of the road, and the running of its cars by the company, and a permanent occupation of the soil. It requires that all other parties shall stand aside and make way for its progress. This is clearly inconsistent with the legal object and design of a highway, which is free and open to all, for purposes of locomotive travel and transportation. The enjoyment of the easement in a highway never confers an exclusive right upon any one who may have occasion to use it, while the laying down of rails, and the employment of cars, is to the detriment and exclusion of all others at the time when the cars are running, and a restraint upon a free, undisturbed, and general public use. It is an assertion of a right to the possession of the highway by a corporation, and an appropriation of it to private occupation, which, by lapse of time,

might ripen into a right, and vest a title in the company.

“Instead of being the exercise of a right of passage and repassage over a highway or street, it cannot, I think, be denied, that it is sometimes an obstruction to travel, and an infringement upon the rights of the public and owners of the land. In narrow streets, where the rails of the road border close upon the sidewalk, it not only interposes obstacles to the traveler, but inflicts injury upon the lot-owner by blocking up the way and preventing a free access to the premises. The large and unwieldy vehicles which are used, which can only proceed upon a track laid for that purpose, with no capacity to turn out, so as to avoid or accommodate ordinary carriages, are often a source of annoyance and obstruction to the free passage of horse and carriages, for periods of greater or less duration, and are inconsistent with the use of an open and free passage of the highway.”

In 1893 in *McCruden v. Rochester Ry. Co.*, 5 Misc. Rep. (N. Y.) 59, 61, Mr. Justice RUMSEY, stating that the Craig Case was still the law of the State upon the question, said: “It is conceded by the defendant that before 1874 the construction of a street railway was an additional burden upon the highway, for which the abutting owner was entitled to be compensated, if he was, at the same time, the owner of the fee of the street. *Craig v. Rochester*

City, etc., R. Co., 39 N. Y. 404. Although that case was decided by a divided court, it was simply an application of principles which had long been thoroughly settled in this State, and as such it has been invariably approved, whenever it has been cited. It has now become a rule of property which no court would venture to overthrow. *Fobes v. Rome, etc., R. Co.*, 121 N. Y. 505, 515, 24 N. E. 919. The amendment to the Constitution in 1874 did not at all affect the rule laid down in the *Craig Case*, 39 N. Y. 404. The legislature always had power to authorize the construction of street railways in any city. This they could do without compensation to the abutting owners, if the fee of the street was in the city, while such owners were entitled to compensation if they had the fee. The legislature could give this permission by general or local acts, as it saw fit. The amendment to the Constitution (art. III, § 18) forbade the legislature to grant by private or local act to any corporation the right to lay down railroad tracks. The section then proceeded to require that the legislature should pass general laws for the acquisition of such rights. But it put upon that power of the legislature a limitation which had not previously existed, and that was that no law should be passed to authorize the construction of a street railroad except with the consent of property-owners, or if that consent could not be obtained, by direction of the Supreme Court. There is nothing in the amendment from which it can be inferred that the rights of property-owners were in

the slightest degree infringed or diminished. On the contrary, the express object of the amendment was to give them additional protection against the acts of the legislature. The right of an individual to compensation, when an additional burden is put upon the property for public purposes, is well established and secured, and no change of the organic law should be construed to affect such a right, unless it be plainly expressed or necessarily to be inferred from the language of the Constitution. That is not the case here. This amendment has all the effect that can be claimed for it when it is construed to give to property-owners a limited right to control the construction of a street railway in front of their premises. Since 1874 there have been very many cases in which the construction of street railroads in front of private property has been enjoined at the suit of persons who owned the fee of the highway. In none of these cases has it ever been suggested that the amendment of 1874 took away their rights to compensation. That of itself is strong evidence that no such construction should be given to it. I am quite clear that the case of *Craig v. Rochester, etc., R. Co.*, 39 N. Y. 404, is still the law of the State."

On the 1st April, 1902, the Court of Appeals followed the *Craig case* in obedience to the doctrine of *stare decisis*; PARKER, Ch. J., in his dissenting opinion, stated that he did not disagree with his associates as to the scope of the decision in the *Craig case*, nor did they disagree with his contention that that decision was a mistake. *Peck v.*

the owner of the fee.<sup>23</sup> It is also settled law in New York that the owner of a lot which extends to the side of a public street has an easement in the street for light, air, and access for the benefit of his abutting property, which constitutes private property within the meaning of the constitutional provision that private property shall not be taken for a public use without just compensation.<sup>24</sup> And the fact that the title to the bed of the street is in private individuals will not prevent the acquisition, by the owner of land bordering on such street, of rights, as against the public, in the nature of easements, which will prevent the public from devoting such street to uses inconsistent with its free use as a street, without making compensation to him.<sup>25</sup> But these private rights in a public street may be lost in case their existence is denied, and they are exclusively possessed for more than twenty years by one who claims to own the fee of the street, or some adverse right, as against the world.<sup>26</sup> So long however as the abutting owner continues to own the property and is liable to be injured in respect thereto by the unlawful acts of others, he is entitled to invoke the protection of the fundamental law, without regard to the lapse of time that may occur before the commencement of legal proceed-

Schenectady Ry. Co., 27 N. Y. L. J. 165; to be reported in 170 N. Y. 298.

23. Williams v. N. Y. C. R. Co., 16 N. Y. 97. And see Spencer v. Met. St. R. Co., 120 Mo. 154, 22 L. R. A. 668, 23 S. W. 126.

24. Abendroth v. Manhattan R. Co., 122 N. Y. 1, 33 St. Rep. (N. Y.) 475, 25 N. E. 496, 11 L. R. A. 634, 46 Am. & Eng. R. Cas. 128, 19 Am. St. Rep. 461, 24 Ohio L. J. 340, 8 Ry. & Corp. L. J. 514. And see Lamm v. Chic., St. P., M. & O. R. Co., 45 Minn. 71, 10 L. R. A.

268, 47 N. W. 455, 46 Am. & Eng. R. Cas. 42, 9 Ry. & Corp. L. J. 222; Matlage v. N. Y. El. R. Co., 58 Hun (N. Y.) 603; mem., 33 St. Rep. (N. Y.) 918, 11 N. Y. Supp. 482.

25. Kane v. N. Y. El. R. Co., 125 N. Y. 164, 11 L. R. A. 640, 46 Am. & Eng. R. Cas. 137, 26 N. E. 278, 34 St. Rep. (N. Y.) 876, 9 Ry. & Corp. L. J. 142.

26. Woodruff v. Paddock, 130 N. Y. 618, 29 N. E. 1021; Lewis v. N. Y. & H. R. Co., 162 N. Y. 202, 56 N. E. 540.

ings, providing the remedy is claimed within the statutory period of limitation applicable to his legal right, or before adverse possession has barred his title to the property injured. The lapse of six years after the construction of a railroad in a New York State street, unlawful as to the abutting owner, bars, not only the legal, but also constitutes a practical defense to an equitable action founded upon the necessity of numerous legal actions to obtain redress, because the right to such redress has, as to such wrongs, expired. But, if the trespasses are continued after that period, new causes of action arise, unbarred by any rule of law or equity, which are cognizable, not only at law, but also in equity.<sup>27</sup> But the right of abutting owners in the street is not of that absolute character that they can resist or prevent any or all interference with the street to their detriment, or which can be asserted to stay the hand of the municipality in the control, regulation, or improvement of the streets in the public interests, although it may be made to appear that the privileges which they had theretofore enjoyed, and the benefits they had derived from the streets in their existing

27. Galway v. M. E. R. Co., 128 N. Y. 132, 144, 147, 28 N. E. 479; Uline v. N. Y. C. & H. R. R. Co., 101 N. Y. 98, 4 N. E. 536; Arnold v. H. R. R. Co., 55 N. Y. 661; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427; Tallman v. M. E. R. Co., 121 N. Y. 123, 23 N. E. 1134. But see Ferguson v. Covington & C. El. R., etc., Co., 57 S. W. 460, holding that where a railroad was constructed in a street under legislative and municipal authority, though the entire width of the street was used so as to interfere with its use for the passage of persons and vehicles, the right of the

abutting property-owner to enjoin the railroad company from using so much of the street as may be necessary for the passage of vehicles accrued when the road was put in operation, if injunction was the proper remedy, and the right was barred after the lapse of five years from that time, under Ky. Stat., § 2515, providing that any action for trespass on real or personal property, \* \* \* or any injury to the rights of plaintiff, not arising on contract, shall be commenced within the five years next after the cause of action accrued."

condition would be curtailed or impaired to their injury by the changes proposed.<sup>28</sup> The laying of tracks for the running of cars by steam or horse power on the grade of a city street, and the operation of trains thereon under legislative and municipal authority where the fee of the soil is in the municipality, violates no property rights of an abutting owner, and consequently, in the absence of a special statute authorizing compensation, and in the absence of negligence, he is without remedy although his property may be injured. Such use of the streets is consistent with their use as public, open streets, and with the trust upon which the streets are held.<sup>29</sup> But neither horse nor steam railroads, or railroads in the operating of which any other motive power is used, can be authorized in streets the fee of which is in the adjacent owner, without his consent. The distinction is made to rest upon the location of the fee.<sup>30</sup> Since local authorities can license a street surface railroad corporation to use a street,<sup>31</sup> the right of the abutter to compensation is against the railroad company and not against the city.<sup>32</sup>

28. *Reining v. N. Y., L. & W. R. Co.*, 128 N. Y. 157, 164, 28 N. E. 640.

29. *Reining v. N. Y., L. & W. R. Co.*, 128 N. Y. 157, 162, 28 N. E. 640; *Fobes v. R. W. & O. R. Co.*, 121 N. Y. 505, 24 N. E. 919; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-second St. & G. S. F. R. Co.*, 50 N. Y. 206; *Conabeer v. N. Y. C. & H. R. R. Co.*, 156 N. Y. 474, 51 N. E. 402.

30. *Reining case, supra*, p. 163; *Williams v. N. Y. C. R. Co.*, 16 N. Y. 97; *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404; *Clark v. Middletown-Goshen Traction Co.*, 6 Am. Electl. Cas. 148, 10 App. Div. (N. Y.) 354, 41 N. Y. Supp. 1109.

31. *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *Atchison & N. R. Co. v. Manley*, 42 Kan. 577, 22 Pac. 567; *Arcata v. Arcata & M. R. Co.*, 92 Cal. 639, 28 Pac. 676.

32. *Burkam v. Ohio & M. R. Co.*, 122 Ind. 344, 43 Am. & Eng. R. Cas. 153, 23 N. E. 799; *Duke v. Baltimore, etc., R. Co.*, 129 Pa. St. 422, 24 W. N. C. 563, 47 Phila. Leg. Int. 225, 18 Atl. 566.

A municipal corporation is not liable for damages inflicted upon abutting property by the grading of a portion of the width of the street up to the established grade by a street railroad company, which was required as a condition of constructing its tracks through

**§ 4. Remedies of abutting owners.**—An abutting owner is not entitled to enjoin the construction of a street railroad merely because his property would be injuriously affected or damaged thereby, or because the railroad was not legally authorized.<sup>33</sup> He cannot raise the objection that the railroad company has failed to acquire the right to occupy the street, from other owners who have raised no objection to such occupation.<sup>34</sup> He is entitled to maintain an action to recover damages for the construction and use of the railroad, where the company has taken no steps under the statute for the determination of his damages; and he can recover therein the actual damages sustained between the time of the laying of the tracks and the institution of the suit.<sup>35</sup> A municipal ordinance granting to a railroad company the right to construct a railroad on certain streets of a city, and providing that the company shall pay to any property-owner all damages that he may sustain by reason of the construction of the road, and all damages that may be recovered either

the street, to place it on the official grade; the company is liable for such damages. *Bancroft v. San Diego*, 120 Cal. 432, 52 Pac. 712.

An ordinance authorizing the construction of a street railroad through the city streets providing that for any final judgment recovered for injuries done to private property by the location and construction of the road, or any other judgment recovered under the ordinance, the owner shall, in addition to his ordinary remedies, have the right to enjoin the operation of the road unless the judgment is paid within sixty days—does not apply to a judgment recovered for damages to property not abutting

on any opened street, lane or alley of the city, but resulting from an invasion of the owner's private rights. *McColgan v. Baltimore Belt R. Co.*, 86 Md. 325, 37 Atl. 716.

33. *Genl. El. R. Co. v. Chicago & W. Y. R. Co.*, 184 Ill. 588, 56 N. E. 963, revg. 84 Ill. App. 640; *People, Kunze v. Ft. Wayne & E. R. Co.*, 92 Mich. 522, 16 L. R. A. 752, 52 N. W. 1010.

34. *Sinnot v. Chicago & N. W. R. Co.*, 81 Wis. 95, 50 N. W. 1097.

35. *Taylor v. Bay City St. R. Co.*, 101 Mich. 140, 1 Am. & Eng. R. Cas. N. S. 165, 50 N. W. 447; *Limburger v. San Antonio Rapid Transit R. Co.*, (Tex. Civ. App.) 27 S. W. 198.

against the company or against the city on account of its construction, and indemnify and save harmless the city from all liability, direct or remote — is intended only for the benefit of the city and does not entitle the property-owner to recover damages which he would not otherwise be authorized to recover.<sup>36</sup> If an abutting owner convey the right of way to a railroad company, he is not entitled to additional damages upon the subsequent construction of a side track upon such right of way.<sup>37</sup> Neither can he enjoin the construction of an electric street railroad because it prevents the backing up of a wagon or dray at right angles to the sidewalk for the purpose of loading and unloading, where such method is prohibited by city ordinance.<sup>38</sup> Nor can he cut a feed wire erected across the sidewalk in front of his property, because the company has only the right to construct a single track in the street, and is proceeding to place two tracks therein.<sup>39</sup> Several abutting owners may join as plaintiffs in an action to abate and restrain a public nuisance created by maintaining or operating an unauthorized street railroad in the street along their property, although the special injury to each lot-owner is separate and distinct from other special injuries. So too they may join to restrain the threatened construction of such road unless there is something in the statutes, or practice, of the particular State to prevent.<sup>40</sup> Where in one

36. Henderson Belt R. Co. v. Dechamp, 95 Ky. 219, 16 Ky. L. Rep. 82, 24 S. W. 605.

37. San Antonio & A. P. R. Co. v. Faires, (Tex. Civ. App.) 26 S. W. 82; Carson v. Central R. Co., 35 Cal. 325.

38. Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50, 44 Am. St. Rep. 203, 15 Ky. L. Rep. 417, 23 S. W. 592; Sells v.

Columbus St. R. Co., (Ohio C. P.) 28 Ohio L. J. 172.

39. Paterson R. Co. v. Grundy, 4 Am. Electl. Cas. 173, 51 N. J. Eq. (6 Dick.) 213, 56 Am. & Eng. R. Cas. 486, 26 Atl. 788.

40. Taylor v. Bay City St. Ry. Co., 80 Mich. 77, 45 N. W. 335. In the case cited the court, per GRANT, J., said: "The complainants were alike affected by the con-

of these equity suits, the sole plaintiff conveys the property pending the litigation, he may, in New York, make a timely motion on notice to the defendant for an order bringing in his grantee, and when the record is so amended, the trial may proceed as if the conveyance had not been made.<sup>41</sup> And in case of a conveyance of the plaintiff's land pending the litigation, a court of equity may, upon the trial, admit the new parties to the record, when they ask to be heard and when their presence is necessary for a complete determination of the controversy, the defendant being permitted to meet the new situation in any way it could be met after the service of a supplemental complaint.<sup>42</sup> In New York also an action may be brought by an abutting owner suffering special injury because of an unauthorized use of the street by a railroad company, for an injunction and damages down to the time of trial; and the court may, unless the company is a wanton trespasser, ascertain the plaintiff's damages on the assumption that the use claimed to be wrongful would continue permanently, and direct that upon tender of conveyance of the right by plaintiff, defendant should pay the permanent damages, or otherwise that injunction should

struction of this road. They were alike interested to restrain its construction. Their interests were, therefore, common. There was but one object to be accomplished and no necessity existed for a multiplicity of suits. The defendant was not prejudiced by the joinder of complainants. We see no objection to parties joining in a suit, the sole purpose of which is to obtain an injunction to restrain the commission of an act threatened by one party, and alike injurious to the interests of all." And see Cadigan

v. Brown, 120 Mass. 493; Pettibone v. Hamilton, 40 Wis. 402. But see to the contrary, Moran v. Lydecker, 27 Hun (N. Y.), 582; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. (2 C. E. Green) 75.

41. Koehler v. N. Y. El. R. Co., 159 N. Y. 218, 53 N. E. 1114.

42. Mooney v. N. Y. El. R. Co., 163 N. Y. 242, 57 N. E. 496, 31 Civ. Pro. (N. Y.) 49; revg. 13 App. Div. (N. Y.) 380; 43 N. Y. Supp. 35.

issue.<sup>43</sup> One who lives adjacent to a street railway and owns considerable property there which he has improved relying upon the facilities afforded by the line has a material individual interest which entitles him to be a relator in mandamus to enforce the operation of the line.<sup>44</sup> It is the duty of the court to determine from the evidence what number and length of switches are necessary for turnouts for a street railway company under a resolution of road commissioners authorizing it to extend its line along a road south of the center thereof, except at points where crossovers, switches, and turnouts are required, where the company is attempting to double track its road, or at least a large portion of it.<sup>45</sup>

**§ 5. Eminent domain.**—The true definition for eminent domain under constitutional provision for its exercise is “the sovereign power, vested in the State to take private property for public use, providing first a just compensation therefor.”<sup>46</sup> “The power of eminent domain which resides in the State as an attribute of sovereignty, is nevertheless dormant until called into exercise by an act of the legislature. Until a statute authorizes the exercise of the power, it is latent and potential merely, and not active and efficient, and the State can neither exercise the prerogative, nor can it delegate its exercise except through the medium of legislation. Therefore it is wherever an attempt is made either by the officers of the State or by a corporation organized for a public purpose to take private property under the power of eminent domain, the officers or body claiming the right must be able

43. Galway v. M. E. R. Co., 128 N. Y. 132, 28 N. E. 479.

44. State, Grusfelder v. Spokane St. Ry. Co., 19 Wash. 519, 41 L. R. A. 551, 11 Am. & Eng. R. Cas. (N. S.) 62, 53 Pac. 719.

45. Willis v. Erie City Pass. R. Co., 188 Pa. St. 56, 41 Atl. 607.

46. Trenton Cut-off R. Co. v. Newton, etc., Ry. Co., 8 Pa. Dist. 549.

to point to a statute conferring it. In the absence of statutory authority private property cannot be invaded by this power, however strong may be the reasons for the appropriation. In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of the government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property. The rule of strict construction of condemnation statutes is especially applicable to the delegation of the power by the legislature to private corporations. The motive of the promoters of such enterprises is usually private gain, although their creation may subserve a public purpose. When such corporations claim to exercise this delegated power, the rule of strict construction accords with the ordinary rule that delegations of public powers to individuals or private corporations are to be strictly construed in behalf of the public, and by the other principle that private rights are not to be divested except by clear warrant of law."<sup>47</sup> Where provision is made for the exercise of this power and to institute proceedings before a tribunal especially authorized and empowered, upon the failure to obtain the consent of the property-owners, the determination of that tribunal, in lieu of the consent, when made within its jurisdiction and upon proper notice, is conclusive upon all parties and may not be questioned collaterally.<sup>48</sup> But the power can be exercised only

47. Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 490, 15 N. E. 601.

112 N. Y. 61, 20 St. Rep. (N. Y.) 498, 19 N. E. 664.

The proceeding by the court is judicial and not administrative;

48. Matter of Union El. R. Co.,

for the purposes of the company's incorporation. Therefore a railroad company organized to operate a street railroad cannot condemn private property in order to construct its road substantially without the streets.<sup>49</sup> And under a statute

the proceeding therefore must be committed to a court having jurisdiction over the land taken. Property outside of a city cannot be condemned in a city court having no extra-territorial jurisdiction. *Re Buffalo*, 139 N. Y. 422, 54 St. Rep. (N. Y.) 692, 34 N. E. 1103.

49. Matter of S. B. R. Co., 119 N. Y. 141, 23 N. E. 486. In the case cited the court said (p. 145): "The power is not general or unlimited. The company cannot condemn what it pleases, but only such and so much land as the proper execution of its corporate purposes shall require and render necessary. What then were the purposes of the corporation of the South Beach Railroad Company? Obviously they are those, and those only, which the law of its organization describes and defines, and which are certified on its articles of association, operating, when filed, as its charter and measure of its authority. Referring to those we see that the corporate purposes were not to build a railroad between specified termini by the most feasible route, which is characteristic of an ordinary railroad, but to build and operate a street railroad, such as the act of 1884 contemplates and regulates; and not only that, but one running along three specified avenues in the town of Edgewater and not at all through or along private property. Such are the

prescribed and declared purposes of the incorporation, and the company, it may be conceded, might have the right to acquire by condemnation such and so much of private property as should be reasonably necessary to accomplish those purposes. Now the chief element of a street railway, as authorized by the act of 1884, is that it is built upon and passes along streets and avenues for the convenience of those living or moving thereon. Its fundamental purpose is to accommodate the street travel, and its motive power is dictated and regulated to that end; and while, consistently with its general object, it may need for switches or storage, or stables or stations, the land of private owners, yet that necessity is only incidental to the main purpose of a line along the streets to accommodate the street travel. Here the land of Mrs. Brynes is needed to build the main and principal part of the line, only that it may avoid the streets altogether. The act of 1884 stamps an indelible mark upon the corporations which it organizes. The consent of the local authorities is to be obtained, and that of a certain portion of the abutting owners, or in default of the last the certificate of chosen commissioners. Every step of the way, through all the conditions of the act, it plainly contemplates a railway along the streets and ave-

authorizing a corporation to be formed for the purpose of constructing a railroad for public use in the conveyance of "persons and property" and giving such a corporation all the privileges of a railroad corporation, including eminent domain, the formation of a railroad corporation for the purpose of carrying persons only is not authorized and a corporation so organized cannot maintain condemnation proceedings.<sup>50</sup> So too an act providing that when it is necessary for the construction of a street railroad, or for the necessary sidings, to take or damage private property, the same may be done and the compensation therefor made, as provided by law in eminent domain proceedings, does not authorize a street railroad to take private property for a right of way, though an ordinance of a city authorizes it to lay its tracks on the streets thereof over a part of its route, and over private property as to the balance thereof, as the refusal of the council to permit the company to lay its tracks in the streets for the whole distance is not such a necessity as would authorize it to exercise the power of eminent domain.<sup>51</sup>

nues of a village or city. The petitioner chose to organize under that act, to build and operate the kind and character of a railway which it contemplated, to declare in precise terms that the objects of its incorporation were exactly those of a street railway along named avenues of the village of Edgewater. It is very plain therefore that none of the land of Mrs. Brynes is required for the purposes of its incorporation by the South Beach Railway Company, but that the property is wanted to enable the company to disown and abandon these pur-

poses and cease to be a street railway at all.

50. Chicago & N. W. Ry. Co. v. Oshkosh, A. & B. W. R. Co., 107 Wis. 192, 83 N. W. 294. And see *In re Minneapolis & St. L. R. Co.*, 76 Minn. 302, 79 N. W. 304.

51. Dewey v. Chicago & M. El. Ry. Co., 184 Ill. 426, 56 N. E. 804. A street railroad company authorized by its original charter to acquire a right of way provided its road shall be completed and in operation within two years, in default of which the act was to be void, and which by a supplementary act is authorized to con-

Where a street railroad company is authorized by its charter to leave the public highway in case of necessity and condemn private property, it must make a return thereto as soon as practicable.<sup>52</sup> The word "necessity" as used in the act cannot be limited to an absolute physical necessity, but should be construed to mean expedient, reasonably convenient, or useful to the public.<sup>53</sup> Such necessity exists when by leaving the highway and going onto private property, excessive gradients and dangerous grade crossings may be avoided.<sup>54</sup> But a city council cannot, by ordinance, direct the location of the railroad upon private property; since private property can only be condemned in cases of necessity under the statute and not upon the judgment of a city council.<sup>55</sup> The power of eminent domain can only be exercised for a public purpose. Therefore a railway company cannot maintain condemnation proceedings, where its termini are upon or entirely surrounded by the lands of another corporation for the con-

demn land for the construction of a branch line, subject to all the duties and responsibilities which devolved upon the corporation in respect to its original line, cannot condemn lands after its failure to complete the branch line within two years. Williamson v. Gordon Heights R. Co. (Ch.), 40 Atl. 933, 14 Am. & Eng. R. Cas. (N. S.) 809.

52. Aurora & G. R. Co. v. Harvey, 178 Ill. 477, 53 N. E. 331. See Harvey v. Aurora & G. R. Co., 174 Ill. 295, 51 N. E. 163, 30 Chic. Leg. N. 401, 17 Nat. Corp. Rep. 66.

53. Aurora & G. R. Co. v. Harvey, *supra*; Coates v. New York, 7 Cow. (N. Y.) 585; Commissioners, etc. v. Moesta, 91 Mich. 149,

51 N. W. 903; Pettingill v. Porter, 8 Allen (Mass.), 1, 85 Am. Dec. 671; Hays v. Briggs, 3 Pittsb. 504.

54. Aurora & G. R. Co., *supra*.

55. Harvey v. Aurora & G. Ry. Co., 186 Ill. 283, 57 N. E. 857. The case cited also held that it is not necessary to the exercise of the power to condemn private property for the construction of a street railroad that the consent of the city be obtained as that may be secured subsequently. But see Town of Lysander v. S. L. & B. R. Co., 31 Misc. Rep. (N. Y.) 330, and *Re Rochester El. Ry. Co.*, 123 N. Y. 351, 46 Am. & Eng. R. Cas. 157, 33 St. Rep. (N. Y.) 695, 25 N. E. 381, holding that the statutory consents are an essential prerequisite.

venience of which it was chiefly organized, its only business being to transport the property of such corporation and to transport coal under special contract with one individual.<sup>56</sup> It cannot maintain proceedings to quiet its title to lands which it claims already to own, nor for the purpose of compelling specific performance of a contract entered into by it with other persons.<sup>57</sup> The question whether or not it is improperly exercising its franchise cannot be raised on a condemnation proceeding; but only by the people in a proceeding instituted for that purpose.<sup>58</sup> It must however be a body corporate, *de jure*; it cannot maintain the proceeding if it is simply a *de facto* corporation. The constitutional protection of the rights of private property requires that the powers granted be strictly pursued and all the prescribed conditions performed.<sup>59</sup> Usually the power to condemn

56. *Re Split Rock Cable Road Co.*, 128 N. Y. 408, 28 N. E. 506, 40 St. Rep. (N. Y.) 334, 11 Ry. & Corp. L. J. 20.

57. *Florence, etc., R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. 857.

In New York the statute provides that the proceedings may be maintained, where title to real estate has been acquired or attempted to be acquired, and has been found to be invalid or defective. The Railroad Law, chap. 39 of Gen. Laws, art. I, § 7, chap. 565 of 1890, 3 Heydecker's Gen. Laws (2d ed.), 3257. And see *Re P. P. & C. I. R. Co.*, 67 N. Y. 371, 376.

58. *Thomas v. St. Louis, etc., R. Co.*, 164 Ill. 634, 46 N. E. 8.

59. *N. Y. Cable Co. v. Mayor, etc., of N. Y.*, 104 N. Y. 1, 10 N. E. 332; *New Albany & Salem*

R. Co. v. O'Daily

13 Ind. 353. But see to the contrary, *Thomas v. St. Louis, etc., R. Co.*, 164 Ill. 634; *supra*, 46 N. E. 8. In the case first cited, upon a motion for a reargument, the court, per RAPPALLO, J., page 43, said: "In order to sustain proceedings by which a body claims to be a corporation, and as such empowered to exercise the right of eminent domain, and under that right to take the property of a citizen, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*. Where it sought to take the property of an individual under powers granted by an act of the legislature to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted by

property to their use is conferred upon railroad corporations by statute.<sup>60</sup> And where the company has complied with all the preliminary steps required by the legislature, its decision as to the extent, nature, and propriety of the taking of land for the purposes of its organization is as conclusive as when made by the legislature itself.<sup>61</sup> The statute conferring the power does not limit its exercise to a public use, but may

the legislature be strictly pursued and all the prescribed conditions be performed. Where the power is conferred upon a corporation, duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a cause of forfeiture of its rights and franchises, for it rests with the State to determine whether such forfeiture shall be enforced. Judicial proceedings are necessary to enforce such a forfeiture and it may be waived. That was the point to which the opinion in the Matter of the Brooklyn, etc., Railroad Co., 72 N. Y. 245, cited by the appellant was directed. It was assumed that this distinction was well understood, and a considerable portion of the opinion of this court in the present case was devoted to showing that the omissions and defects in the organization of the company were failures to comply with the conditions precedent to the existence of the petitioner as a corporation, and the exercise by it of the rights of eminent domain, instead of being mere causes of forfeiture of rights acquired.

60. The N. Y. Stat., the Railroad Law, chap. 39 of Gen. Laws, chap. 565 of 1890, § 4, 3 Heydeck-

er's Gen. Laws (2d ed.), 3252, is as follows:

"§ 4. Additional powers conferred.—Subject to the limitations and requirements of this chapter, every railroad corporation in addition to the powers given by the General and Stock Corporation Laws, shall have power.

"1. \* \* \* .

"2. Acquisition of real property.—To take and to hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; and to acquire by condemnation such real estate and property as may be necessary for such construction, maintenance, and accommodation in the manner provided by law, but the real property acquired by condemnation shall be held and used only for the purposes of the corporation during the continuance of the corporate existence."

61. N. Y., N. H. & H. R. Co. v. Long, 69 Conn. 424, 37 Atl. 1070; People, Herrick v. Smith, 21 N. Y. 595; Ashe v. Cummings, 50 N. H. 591; National Docks R. Co. v. Central R. Co., 32 N. J. Eq. 755; United States v. Jones, 109 U. S. 513, 27 L. Ed. 1015.

leave that question for the court's determination.<sup>62</sup> So when a suburban railroad company, authorized to condemn land for its "corporate purposes" seeks to compel the transfer of city land, five miles from the nearest point of its railroad for a power-house, the court held that it was not a necessary public use to erect a power-house on that particular lot.<sup>62</sup> The proprietary right which a street railroad company has in its tracks and right of way is itself subject to condemnation.<sup>63</sup> The United States condemned lands of such a company for the purpose of preserving the battlefield of Gettysburgh.<sup>64</sup> The construction of a public ditch across the right of way of a railroad company, though the ditch be constructed by tiling under the surface, is an appropriation of the company's property which entitles it to compensation for the value of the interests so taken.<sup>65</sup>

**§ 6. Proceedings to ascertain compensation.**—The proceeding for the ascertainment of the value of the property and the consequent compensation to be made is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners, or special boards or the courts, with or without the intervention of a jury as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value and to be heard

62. *Re R. I. Suburban Ry. Co.* (R. I.), 48 Atl. 591.

*El. Ry. Co.*, 160 U. S. 668, 40 L. Ed. 576.

63. *Canal & C. St. R. Co. v. Crescent City R. Co.*, 41 La. Ann. 561, 40 Am. & Eng. R. Cas. 329, 6 So. 849.

65. *Lake Erie & W. R. Co. v. Commissioners of Hancock Co.*, 63 Ohio St. 23, 57 N. E. 1009. See *Northwestern Tel. Exch. Co. v. Railway Co.*, 76 Minn. 334, 79 N. W. 315.

64. *United States v. Gettysburg*

thereon. Whether, when the United States seeks to condemn, the tribunal shall be created directly by an act of Congress, or one already established by the States, shall be adopted for the occasion, is a mere matter of legislative discretion.<sup>66</sup> All of the statutory requirements to entitle the company to maintain the proceeding must exist and their existence should be alleged in detail in the petition, unless the statute prescribes the form of the petition. In New York it is only necessary to state in literal compliance with the Code Civ. Proc., § 3360, subd. 7, that all the preliminary steps required by law have been taken to enable the plaintiff to institute the proceeding.<sup>67</sup> Where right of way in a street is sought to be condemned, it should accurately state the frontage of the abutting owners whose rights are to be

66. *United States v. Jones*, 109 U. S. 513, 519, 27 L. Ed. 1015, 1017; *Backus v. Fort St. Union Depot Co.*, 169 U. S. 568, 42 L. Ed. 859, 18 Sup. Ct. Rep. 450; *Bauman v. Ross*, 167 U. S. 593, 42 L. Ed. 289, 17 Sup. Ct. Rep. 983; *Great Falls Mfg. Co. v. Garland*, 25 Fed. 524; *Morris v. Comptroller*, 54 N. J. L. 273, 23 Atl. 665; *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94, 51 Am. & Eng. R. Cas. 66, 23 Atl. 74; *Martin v. Tyler*, 4 N. Dak. 299, 60 N. W. 399, 25 L. R. A. 846; *Bigelow v. Draper*, 6 N. Dak. 165, 69 N. W. 574. In Missouri either party upon exceptions to report of commissioners may have the amount of damages assessed by a jury. *Chicago, S. F. & C. R. Co. v. Bates*, 109 Mo. 53, 18 S. W. 1133; *Same v. Eubanks*, 109 Mo. 54, 18 S. W. 1134; *Same v. Miller*, 106 Mo. 458, 17 S. W. 499, 11 Ry. & Corp. L. J. 22. So also in Illinois, *Davis v.*

*N. W. El. R. Co.*, 170 Ill. 595, 48 N. E. 1058, 9 Am. & Eng. R. Cas. (N. S.) 452; in West Virginia, *Charleston, etc., Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

67. *Rochester R. Co. v. Robinson*, 133 N. Y. 242, 44 St. Rep. (N. Y.) 872, 30 N. E. 1008. The provisions of the statute must be strictly pursued. *Colorado C. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605; *Toledo, etc., R. Co. v. Munson*, 57 Mich. 42, 23 N. W. 455; *State v. Farrelly*, 36 Mo. App. 282; *Chicago, etc., R. Co. v. Chicago*, 132 Ill. 372, 23 N. E. 1036; *Ames v. Union Co.*, 17 Oreg. 600, 22 Pac. 118, 27 Am. & Eng. Corp. Cas. 60. Wife of the owner of the fee is an owner within New York statute (Civ. Code, §§ 3358-3360), and her residence must also be stated. *Marcellus El. R. Co. v. Crisler*, 33 Misc. Rep. (N. Y.) 1.

acquired.<sup>68</sup> It need not state the grade of the road.<sup>68</sup> In Wisconsin it should state that the route of the railroad has been located and the lands described are required for the construction and operation of the proposed railroad.<sup>69</sup> In Nebraska, the petition need neither be dated or verified nor need it allege the exact position of the lands sought to be condemned, or aver the act of incorporation of the railroad company.<sup>70</sup> If however the railroad company fails to describe in its petition or notice the particular tract of land it intends thereby to condemn, in order to conceal its real purpose and object, and its entire proceedings show that it intends to obtain possession of the other company's right of way without making compensation therefor, the condemnation proceedings may be held void and the company may be restrained from taking possession of the land, or interfering with the possession of the occupant.<sup>71</sup> Condemnation pro-

68. Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533, 51 N. W. 808. In Nebraska a description by government subdivision of the lands affected, within an incorporated city which has been laid out and plotted into lots and blocks, is insufficient. Omaha & R. V. R. Co. v. Rickards, 38 Nebr. 847, 57 N. W. 739.

69. Winnebago Furniture Mfg. Co. v. Wisconsin M. R. Co., 81 Wis. 389, 51 N. W. 576. In New York, where the center line of the proposed railroad was actually staked out upon the ground, a description in the petition beginning at a center station on said center line was held sufficient, although the referee found that the station could not be ascertained without reference to the map of lands

sought to be condemned, on file in the county clerk's office. Stillwater & M. St. R. Co. v. Slade, 36 App. Div. (N. Y.) 587, 55 N. Y. Supp. (89 St. Rep.) 966. If the map does not show the parcel it is insufficient. Marcellus El. R. Co. v. Crisler, 33 Misc. Rep. (N. Y.) 1.

70. Trester v. Mo. P. R. Co., 33 Nebr. 171, 49 N. W. 1110, 10 Ry. & Corp. L. J. 47.

71. Union Terminal R. Co. v. Kansas City Belt Ry. Co., 9 Kan. App. 281, 60 Pac. 541. A railroad company petitioning to condemn whatever "property rights, interest or privileges" another corporation may have in certain streets by contract with the city is estopped to deny that the other has any interest in what is sought to be con-

ceedings may be discontinued, with the permission of the court at any time before the award of compensation is actually filed, unless the statute clearly provides otherwise. Provision that the commissioners shall proceed to perform their duty on demand of either party and file their report within a specified time will not preclude such discontinuance.<sup>72</sup> But where the landowner has procured a preliminary injunction restraining the construction of the road which is vacated upon a stipulation that the company should vigorously prosecute its proceedings to acquire a right to operate the road and should give an undertaking of indemnity, it will not be permitted to discontinue its proceedings taken in accordance therewith unless the landowner consents.<sup>73</sup> In New York the landowner must institute proceedings to review the location of a proposed extension of a railroad within fifteen days after notice; otherwise he cannot raise the question of location in a proceeding to condemn his land for that purpose.<sup>74</sup> Commissioners of appraisal appointed in proceedings to condemn land for the uses of a railroad company are not disqualified because they were formerly owners of

demned. (*Met. St. Ry. Co. v. Chicago West Division R. Co.*, 87 Ill. 317.) The right of a company operating a horse railway by contract with the city not to have a similar railway on certain streets parallel therewith is "property" within the Eminent Domain Act, is subject to condemnation thereunder, and is no part of the franchise. *Id.* Permission from the city to locate such road is not necessary to authorize the condemnation. *Id.*

72. *Milwaukee & L. W. R. Co. v. Stolze*, 101 Wis. 91, 76 N. W. 1113. In Illinois it is held that a

city may abandon the proceedings even after award without rendering itself liable for the amount thereof in an action of *assumpsit*, as the proceeding merely fixes the amount to be paid before the property can be lawfully taken. *Chicago v. Hayward*, 176 Ill. 130, 52 N. E. 26, revg. 60 Ill. App. 582; *Pearce v. Chicago*, 176 Ill. 152, 52 N. E. 27, affg. 67 Ill. App. 671.

73. *Re Southern Boulevard R. Co.*, 43 St. Rep. (N. Y.) 611.

74. *Stillwater & M. St. R. Co. v. Slade*, *supra*.

stock and incorporators of the predecessor of the company, bringing the proceeding, where they no longer hold any stock and have no interest in the company.<sup>75</sup> Proceedings before such commissioners are not conducted on the strict line of trials before courts.<sup>76</sup> They may properly be influenced in their appraisal by their personal inspection and examination of the premises.<sup>77</sup> The right of the landowner whose property is being "taken" to ride on the road to be constructed, on paying the usual rate of fare, is part of the "public use," the benefits arising from which cannot be considered in ascertaining his proper compensation.<sup>78</sup> The inability to agree upon the compensation to be paid cannot be alleged and proved as a conclusion. But the facts showing the inability must be alleged in sufficient detail so that the court may say if the allegation were proven the inability to agree would be established. If it appear from the testimony, that there is an irreconcilable difference in opinion as to the value of the property being "taken" the inability to agree is proved.<sup>79</sup> In a proceeding by a company to condemn lands, where the charter of the company permits it

75. *Re Brooklyn El. R. Co.*, 32 App. Div. (N. Y.) 221, 52 N. Y. Supp. (86 St. Rep.) 997.

76. *Re Staten Island Midland R. Co.*, 22 App. Div. (N. Y.) 366, 48 N. Y. Supp. (82 St. Rep.) 274.

77. *Re Daly*, 26 App. Div. (N. Y.) 326, 49 N. Y. Supp. (83 St. Rep.) 795; *Davis v. Northwestern El. R. Co.*, 170 Ill. 505, 48 N. E. 1058, 9 Am. & Eng. R. Cas. (N. S.) 452.

78. *Lewiston, etc., R. Co. v. Ayer*, 27 App. Div. (N. Y.) 571, 50 N. Y. Supp. (84 St. Rep.) 502; *Inter-State Cons. R. T.*

*Co. v. Simpson*, 45 Kan. 714, 26 Pac. 393. A charter making a street railway company liable whenever property on a street "upon or over which the rails \* \* \* shall be laid, shall be injured thereby" does not create a liability for injuries resulting from, or incident to, the laying of them, although these are not restricted to direct and physical injuries. *Vose v. Newport St. R. Co.*, 17 R. I. 134, 20 Atl. 267.

79. *Trotier v. St. Louis, etc., R. Co.*, 180 Ill. 471, 54 N. E. 487; *Toledo, etc., R. Co. v. Toledo El. St.*

to construct and operate its railroad into and between two cities, and the objection is made that it would be impossible for the railroad to construct and operate a continuous road as contemplated, because they could not get the requisite consent in the highway between the two cities, evidence would be proper that the company could and would acquire the property contiguous to such public road.<sup>80</sup> Even though the award, considered only from the evidence as found in the record might be thought excessive, it will not be set aside. The presumption must be, in the absence of anything to the contrary appearing in the record, that the commissioners acted within the law and that the award is supported by the facts which came within the scope of their inquiry, including their view of the premises.<sup>81</sup>

**§ 7. Compensation.**—The adaptability of the landowner's property sought to be taken in condemnation proceedings in its present state and surroundings, for other and more valuable purposes than those to which it has been put, is a proper element to be considered in determining its market value; but its possible value under circumstances and conditions which do not exist but which the owner may intend to create cannot be considered.<sup>82</sup> If it be so situated that it has no market value, then resort may be had to material

R. Co., 6 Ohio C. C. 362; Carlisle v. Des Moines, etc., R. Co., 99 Iowa, 345, 68 N. W. 784; Marcellus El. R. Co. v. Crisler, 33 Misc. Rep. (N. Y.) 1.

80. Almand v. Atl., etc., Co., 108 Ga. 417, 34 S. E. 6.

81. Harlem River, etc., Co. v. Reynolds, 50 App. Div. (N. Y.) 575, 64 N. Y. Supp. (98 St. Rep.) 199.

82. Five Tracts of Land in Cumberland Township, Adams Co., Pa. v. United States, 101 Fed. 661, 41 C. C. A. 580; Chicago, etc., R. Co. v. Dresel, 110 Ill. 89; Hulett v. Mo., K. & T. Ry. Co., 80 Mo. App. 87, 2 Mo. App. Rep. 527; Kay v. Glade Creek & R. Co. (W. Va.), 35 S. E. 973; Kansas, etc., Ry. v. Northwestern Coal & M. Co., — Mo. —, 51 L. R. A. 936.

circumstances showing or tending to show the amount of compensation which should be made.<sup>83</sup> If there be no permanent injury then the difference between fair rental values with and without the railroad furnishes the proper criterion. If the owner is not entitled to the possession, compensation cannot be made to him for the difference in rental value with or without the railroad during the time of the lease.<sup>84</sup> An ordinance granting a franchise to construct a street car line and to erect poles for trolley wires is not invalid for failure to provide for compensation to the abutting property-owners, on the theory that the trolley wires and poles are an additional burden on the fee, where it does not appear that they will interfere with access to the abutting property.<sup>85</sup> The phrase "just compensation" as used in the statutes and ordinances has the same meaning which it has when used in the Federal and State Constitutions with respect to the right of eminent domain; and when thus used, "means a fair and full equivalent for the loss sustained by taking for the public use."<sup>86</sup> It consists in making the owner good by an equivalent in money for the loss he sustains in the value of his property by being deprived of a portion of it.<sup>87</sup>

**§ 8. Consolidation.**— By statute in most of the States, consolidation of street surface railroad companies is allowed if the lines of road operated by them would form one con-

83. Chicago, etc., Ry. Co. v. Chicago & Evanston R. Co., 112 Ill. 589.

84. Carli v. Union Depot St. Ry., etc., Co., 32 Minn. 101, 20 N. W. 89; Chicago, etc., Co. v. Dresel, *supra*.

85. Linden Land Co. v. Milwau-

kee El. Ry., etc., Co. (Wis.), 83 N. W. 851.

86. Grand Ave. Ry. Co. v. People's Ry. Co. (Mo. Sup. Ct.), 6 Am. Electl. Cas. 99; Lewis Em. Dom., § 462.

87. Bigelow v. Railway Co., 27 Wis. 478.

tinuous line of road. The phrase "form a continuous or connected line of railroad with each other," used in the New York statute allowing consolidation of railroads, means a line or route extending or continuing in substantially the same general direction. It excludes the idea of a plurality of lines, and requires that the consolidated roads must form one instead of two or more lines. The consolidation of lines parallel or practically so is prohibited.<sup>88</sup> An act expressly giving power to one corporation to consolidate with any other like corporation is sufficient for the purpose. One corporation cannot form a consolidation unless it finds another with which to unite and which is capable of union with it; hence, whatever other company it selects for a union, and finds willing to join it, that other company, though not named in the statute, gets power from the statute to unite with that company which the statute names.<sup>89</sup> If the act provides that a street surface railroad company may from time to time "consolidate its capital stock and property with the capital stock and property of any street surface railroad company incorporated or to be hereafter incorporated for the purpose of building or operating any street surface railroad," companies may consolidate which have not yet obtained the necessary consents to the building of the roads located by them, and of course had not entered upon the work of construction, but were duly incorporated under the General Railroad Law and had located their routes.<sup>90</sup> A corporation

88. *People v. Boston, H. T. & W. Ry. Co.*, 12 Abb. N. C. (N. Y.) 230; *N. Y. Railroad Law*, § 70 *et seq.*; 3 Heydecker's Gen. Stat. (2d ed.) 3297; *Re Washington St., etc., R. Co.*, 52 Hun (N. Y.), 311, 5 N. Y. Supp. 355; *affd.*, 115 N. Y. 442.

89. *Re P., P. & C. I. R. Co.*, 67 N. Y. 371, 377.

90. *Bohmer v. Haffen*, 161 N. Y. 390, 412, 55 N. E. 1047. The case cited holds that the act of consolidation is valid, although it does not require the consents of abutting

tormed by the consolidation of two or more companies holds its property acquired by such consolidation in its own right, and not in trust for the constituent companies.<sup>91</sup> And where all or nearly all of the property of the constituent companies is turned over to the new corporation the latter is liable for the debts of the several companies to the extent of the property so turned over.<sup>92</sup> And has also all the obligations of its constituent companies, like the paving, repaving, and repairing of streets to perform.<sup>93</sup> But it would seem that a liability of one of the several companies founded upon a tort must be first established by judgment against it before it can be enforced against the consolidated company, unless the statute makes the obligations of the several companies liabilities of the consolidated company.<sup>94</sup> Otherwise, where a railroad company is consolidated with other companies under a new name it ceases to exist as a corporation, and an action brought by or against it before the consolidation cannot

owners and local authorities. In a recent case in the New Jersey Chancery Court, it was held that a *de facto* corporation could enter into a consolidation agreement; and that even if one of four constituent companies could not enter into a consolidation it would not affect the agreement as to the other three. *Re Trenton St. Ry. Co.*, 47 Atl. 819.

91. *Greene v. Woodland Ave. & W. S. St. R. Co.*, 62 Ohio St. 67, 56 N. E. 642; *Indianapolis, etc., R. Co. v. Jones*, 29 Ind. 465; *Louisville, etc., Ry. Co. v. Boney*, 117 Ind. 501, 20 N. E. 432; 3 L. R. A. 435.

92. *U. S. Capsule Co. v. Isaacs*, 23 Ind. App. 533, 55 N. E. 832.

93. *Bohmer v. Haffen*, *supra*; *City of Philadelphia v. Ridge Ave. Pass. R. Co.*, 142 Pa. St. 484, 22 Atl. 695.

94. *Chase v. Mich. Tel. Co.*, 80 N. W. 717; *Powell v. Railroad Co.*, 42 Mo. 63; *Pennison v. Railroad Co.*, 93 Wis. 344, 64 N. W. 702. In Maryland the act authorizing an insolvent railroad company owing a large mortgage indebtedness to the State, to consolidate with another railroad company, but providing that existing liabilities shall continue to bind the company, does not, when the consolidation is effected, release the company from its liability to the State. *Northern Central Ry. Co. v. Hering (Md.)*, 48 Atl. 461.

afterward be prosecuted by or against it in its original name.<sup>95</sup> In a recent case in New York it appeared that two certain street railroad companies in the city of Binghamton had entered into a contract (subsequently legalized by legislature), with the city of Binghamton which provided "that in lieu of all obligations on the part of the said Binghamton and Fort Dickinson Railroad Company to keep the surface of the streets and highways within the rails of its tracks, and for one foot outside thereof and to the extent of its ties, in good and proper repair and order, as required by the act incorporating the said railway company, or by any other provision of law, the said company shall hereafter pay to the city of Binghamton one-fifth of the net cost of laying new pavement between the rails of its tracks, and shall also pay to the said city the sum of \$1,036.22, the same being one-fifth of the cost of paving between the rails of said company's tracks on Chenango street north of the Erie railway, upon the payment of which the said action now pending is to be discontinued without costs to either party." The contract further provided with respect to each of the said railroad companies that it "shall inure to the benefits of and be binding upon" (the companies) "successors and assigns, and to any company with which it may be hereafter merged or consolidated," and that "the terms and conditions herein set forth shall apply and extend to any additions or extensions of the tracks of said railway company." Thereafter these companies were consolidated, and subsequent to such con-

95. Wagner v. Atchison, etc., R. Co. (Kan. App.), 58 Pac. 1018. And see Copp v. Colorado Coal & Iron Co., 60 St. Rep. (N. Y.) 293, 29 Misc. Rep. (N. Y.) 109, where it is held to be a good defense, in

an action against a corporation, to show that before action it was consolidated with another corporation unless separate existence of the constituent corporations is preserved by legislative enactment.

solidation they consolidated with still another company, the Court Street and East End Railroad Company. Subsequently the city of Binghamton paved Court street, upon which the last company had constructed and was operating the railroad before the consolidation, and assessed the consolidated company for one-fifth of the expense of paving between the rails of its tracks on said street. At the suit of an owner of abutting property, who insisted that the consolidated company was liable under the statute for the entire expense of paving between its tracks and two feet in width outside thereof, it was held that the contract in question did not apply to the paving of Court street, and that the intention of the provision therein that it should "inure to the benefits of and be binding upon its successors and assigns, and to any company with which it may be hereafter merged or consolidated," was, that if the property of the contracting railroad corporation should be transferred to another corporation, the exemption as to the streets in which the contracting corporation operated its line shall inure to the benefits of its successors, and that it was not intended to extend the exemption of the tracks to other railroads whose property was acquired by the consolidated corporation; that the last railroad in the consolidation did not come within the clause of the contract that "the terms and conditions herein set forth shall apply and extend to any additions or extensions of the tracks of said railroad company."<sup>96</sup> The phrase, "such terms as they may agree upon,"<sup>97</sup> in a statute authorizing the consolidation of railroad companies, relates

96. Kent v. Common Council of Binghamton, 61 App. Div. (N. Y.) 323, 70 N. Y. Supp. (104 St. Rep.) 465. And see State, Wilbur v.

Trenton Pass. R. Co., 57 N. J. L. (28 Vroom) 212, 31 Atl. 238.

97. Chevra Bnai Israel v. Chevra Bikur Cholim, 24 Misc. Rep. (N.

to the mere administrative details attending the consolidation, and confers no substantive powers or rights.<sup>98</sup> The consolidation which results in the formation of a new company and not merely a merger of the constituent companies, retaining their separate existence, is authorized by statutes providing for the consolidation of companies under the name of one of them, without saying it shall be under its charter, and giving to the new company all the benefits, rights, franchises, and property of the original companies.<sup>99</sup> In Missouri, a new corporation made by consolidation is liable to the payment of the fees required by the State upon the creation or organization of a new corporation.<sup>1</sup> Doubtless it would be so held under the statute of each State authorizing con-

Y.) 189; Davis v. Cong. Tephila Israel, 40 App. Div. (N. Y.) 424, 57 N. Y. Supp. 1015; New York, etc., Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; Blatchford v. Ross, 5 Abb. Pr. (N. S.) 434, 54 Barb. (N. Y.) 42; People v. North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834; Pearce v. Madison, etc., R. Co., 21 How. (U. S.) 441; Clearwater v. Meridith, 1 Wall. (U. S.) 39; Black v. Delaware, etc., Canal Co., 24 N. J. Eq. 455; State v. Bailey, 16 Ind. 46; Aspinwall v. Ohio & M. R. Co., 20 id. 492, 83 Am. Dec. 329; Shelbyville, etc., Turnpike Co. v. Barnes, 42 Ind. 498; East Line, etc., R. Co. v. State, 75 Tex. 434, 12 S. W. 690; Clinch v. Financial Corp., L. R. 5 Eq. 460; Charlton v. Newcastle, etc., R. Co., 5 Jur. (N. S.) 1096; *In re* Era Assurance Society, 30 Law J. Eq. (N. S.) 137; Wood v. St. Paul's City Ry. Co., 42 Minn. 411, 44 N. W. 308; Topeka Paper

Co. v. Oklahoma Pub. Co., 7 Okla. 220, 54 Pac. 455.

98. Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 So. 200. And see as to effect of Ohio act providing for consolidation, Shields v. State of Ohio, 95 U. S. (5 Otto) 319, 24 L. Ed. 357.

99. Adams v. Yazoo & M. V. R. Co., *supra*. And see Indiana, etc., R. Co. v. Jones, 29 Ind. 465; Louisville, etc., Ry. Co. v. Boney, 117 Ind. 501, 20 N. E. 432; State, Nolin v. Montana R. Co., 21 Mont. 221, 53 Pac. 623, 11 Am. & Eng. R. Cas. (N. S.) 353. A street car company having acquired the lines of street railway of two other companies under due authority and consent may connect the lines so acquired by laying its tracks on such portions of a street of the city as may be necessary to make the connection. Brown v. Atlanta R. & P. Co. (Ga.), 39 S. E. 71.

1. State, Houck v. Leuseur, 145 Mo. 322, 46 S. W. 1075.

solidation where fees upon the creation or organization of new corporations were required. Unless the statute provides to the contrary, a stockholder in the constituent corporation is not compelled to take stock in the consolidated corporation in exchange for his stock in the old. He is entitled to have the value of his stock judicially ascertained and paid for before the consolidation takes effect, and may restrain the consolidation until his rights in that regard are secured.<sup>2</sup> A stockholder may also prevent by action the directors of his corporation, who are fraudulently undertaking to merge the existence of the corporation into another competing insolvent corporation.<sup>3</sup>

**§ 9. Use of tracks of other roads and traffic arrangements.—**  
The public has the reserved right to grant the use of street railroad tracks to companies other than those constructing them upon just compensation.<sup>4</sup> Unless the statute expressly requires it, the consent of the abutting owners is unnecessary. The statutes of the several States provide for the use of the

2. *State v. Bailey*, 16 Ind. 46; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42. And see *Post v. Beacon Vacuum Pump and E. Co. (C. C. App., 1st C.)*, 5 U. S. App. 271, 28 C. C. A. 431, 84 Fed. 371. In the case last cited it was held that a minority shareholder, though he has protested against the reorganization scheme, if he subscribe for his proportion of the stock of the new company at such a time as justifies the majority of stockholders in assuming that the new company is authorized to receive the transfer and carry on the business of the old company, is estopped from maintaining a suit to rescind the transfer. And see *Trenton*

*Pass. R. Co. v. Wilson*, 55 N. J. Eq. 273, 37 Atl. 476.

3. *Becker v. Gulf City St. Ry. Co.*, 80 Tex. 475.

4. *St. Louis R. Co. v. Southern R. Co.*, 105 Mo. 581, 46 Am. & Eng. R. Cas. 1, 15 S. W. 1013; *affd. on rehearing*, 16 id. 960; *New Orleans & C. R. Co. v. Canal & C. R. Co.*, 47 La. Ann. 1476, 17 So. 834. The city of New Orleans has the right to authorize other roads to use the tracks, ties, rails, etc., of any street railroad company operating upon the streets of said city. *State, City of New Orleans v. King*, 104 La. 735, 29 So. 359. And see *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330.

tracks of one corporation by another, the extent of such use, how it may be obtained, and how the compensation should be determined; they also generally provide for traffic arrangements to be made by one company with another whereby by contract the right to use the tracks of the other may be obtained by the one to an extent exceeding the limit fixed by statute.<sup>5</sup> Where local authorities may annex conditions

5. N. Y. Stat. (Railroad Law, art. IV, §§ 97-104, 3 Heydecker's Gen. Laws [2d ed.], 3316-3320, chap. 565 of 1890) provide as follows:

"**§ 97. Use of tracks of other roads.**—Any railroad corporation in this state, whose cars are run or operated by horses or other motive power, authorized by this article, upon the surface of the street, excepting in the city and county of New York, may, for the purpose of enabling it to connect with and run and operate its cars between its tracks, and a depot or carhouse owned by it, run upon, intersect and use, for a distance not exceeding five hundred feet, the tracks of any other railroad corporation, the cars of which are run and operated in like manner, with the necessary connections and switches for the proper working and accommodation of the cars upon such tracks, and in connection with such depot or carhouse, upon paying therefor such compensation as it may agree upon with the corporation owning the tracks to be run upon, intersected, and used; and in case such corporations cannot agree upon the amount of such compensation, the same shall be ascertained and de-

termined in the manner prescribed by the condemnation law.

"**§ 102. Construction of road in street where other road is built.**—No street surface railroad corporation shall construct, extend or operate its road or tracks in that portion of any street, avenue, road or highway, in which a street surface railroad is or shall be lawfully constructed, except for necessary crossings or, in cities, villages and towns of less than one million two hundred and fifty thousand inhabitants over any bridges, without first obtaining the consent of the corporation owning and maintaining the same, except that any street surface railroad company may use the tracks of another street surface railroad company for a distance not exceeding one thousand feet, and if in a city having a population of less than thirty-five thousand inhabitants, except Long Island City, for a distance not exceeding fifteen hundred feet, and in cities, villages and towns of less than one million two hundred and fifty thousand inhabitants shall have the right to lay its tracks upon, and run over and use any bridges used wholly or in part as a foot bridge, whenever the court upon an application for commis-

to their consent to the construction of a railroad in the street, the company which accepts a grant containing a reservation to the city of power to condemn parts of tracks to the joint

sioners shall be satisfied that such use is actually necessary to connect main portions of a line to be constructed or operated as an independent railroad, or to connect said railroad with a ferry, or with another existing railroad, and that the public convenience requires the same, in which event the right to use shall only be given for a compensation to an extent and in a manner to be ascertained and determined by commissioners to be appointed by the courts as is provided in the condemnation law, or by the board of railroad commissioners in cases where the corporations interested shall unite in a request for such board to act. Such commissioners in determining the compensation to be paid for the use by one corporation of the tracks of another shall consider and allow for the use of tracks for all injury and damage to the corporation whose tracks may be so used. Any street surface railroad corporation may, in pursuance of a unanimous vote of the stockholders voting at a special meeting called for that purpose by notice in writing, signed by a majority of the directors of such corporation, stating the time, place and object of the meeting, and serving upon each stockholder appearing as such upon the books of the corporation, personally or by mail, at his last known post-office address, at least sixty days prior to such meeting, guarantee the

bonds of any other street surface railroad corporation whose road is fully or partly in the same city or town or in adjacent cities or towns. (As amended by chaps. 306 and 676 of 1892, chap. 434 of 1893, and chap. 693 of 1894.)"

"**§ 103. Abandonment of part of route.**—Any street surface railroad corporation may declare any portion of its route which it may deem no longer necessary for the successful operation of its road and convenience of the public, to be relinquished or abandoned. Such declaration of abandonment may be adopted by the board of directors of the corporation under its seal, which shall be submitted to the stockholders thereof at a meeting called and conducted in the same manner as required by law for meetings of stockholders for the approval of leases by railroad corporations for the use of their respective roads. If the stockholders shall at such meeting, ratify and adopt such declaration of abandonment, the secretary of the company shall so certify under seal of the corporation, upon such declaration. Such declaration shall then be submitted to the board of railroad commissioners for its approval, and if approved by such board, such approval shall be indorsed thereon or annexed thereto, and the declaration so certified and indorsed shall be filed and recorded in the office of the secretary of state, and from the

use of other companies, when it is deemed necessary, upon payment of just compensation, cannot repudiate such conditions on the ground that the city has no statutory power to make condemnation for such purpose.<sup>6</sup> The theory gen-

time of such filing, such portion of the route designated in the declaration shall be deemed to be abandoned. (As amended by chap. 676 of 1892, and chap. 478 of 1900.)"

**"§ 104. Contracting corporations to carry for one fare; penalty.—** Every such corporation entering into such a contract shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section the corporation so refusing shall forfeit fifty dollars to the aggrieved party. The provisions of this section shall only apply to railroads wholly within the limits of

any one incorporated city or village. (As amended by chap. 676 of 1892.)"

Under the Indiana act of 1891 the city might authorize a street railroad company to lay its tracks on the same street on which other tracks were laid but could not authorize the use of such tracks, nor could the rails of one be so laid as to prevent or needlessly impede the running of the other cars. *Citizens' St. R. Co. v. City R. Co. (C. D. Ind.), 64 Fed. 647.*

One street railway company cannot run its cars over the tracks of another company by virtue of the provisions of the Illinois Constitution declaring all railways constructed in the State public highways and free to all persons for the transportation of persons and property thereon under such regulations as may be prescribed by law. *Chicago Gen. R. Co. v. City R. Co. (Ill. C. C.), 27 Chic. Leg. N. 423, 10 Nat. Corp. Rep. 651.*

**6. Mercantile Trust & Deposit Co. of Baltimore v. Collins Park & B. R. Co. (U. S. C. C. Ga.), 101 Fed. 347.** In the case cited it appeared that the city council of Atlanta in a franchise granted to a consolidated street railroad company, reserved to the city "the right to condemn such portions of said lines, not exceeding five blocks, as may be necessary for the allowing of other street car

erally adopted in the several States, along the lines of which statutes and ordinances regulating the matter are made, is that if the construction of an additional track upon the street would be an unnecessary obstruction to and interference with

companies to enter the central portion of the city." It was held that such reservation extended only to those portions of the company's lines within what might fairly be considered the central portion of the city, and did not authorize the condemnation of portions of its tracks outside of that limit, although for the purpose of enabling a new company to ultimately enter the central portion of the city. It was also held that the company could not object to the exercise of the power reserved in any reasonable and proper manner; that the city might, on determining the necessity for condemning portions of a company's tracks for the use of another company, properly authorize the latter to institute proceedings in its own name to make such condemnation in accordance with the procedure prescribed in such cases by the law of the State; that the city council could determine when the necessity existed to exercise the right reserved, subject only to the condition that its judgment must be based on reasonable grounds; and that the exercise of the power of condemnation, under such reservation, as to a short portion of track, is not reasonably justified, when each company requires but a single track and when the street is of a sufficient width to accommodate two tracks without interference with the other travel

along it, or with each other. And see Commonwealth v. Sycamore St. Ry. Co., 3 Dauph. Co. Rep. 95, 30 Pittsb. Leg. J. (N. S.) 333; Kinsman St. R. Co. v. Broadway, etc., R. Co., 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 327; Pacific R. Co. v. Wade, 91 Cal. 449, 50 Am. & Eng. R. Cas. 362, 27 Pac. 768.

The Civil Code of California, § 499, provides that "two lines of street railway operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and other appurtenances used by such railways jointly." In 1897 a street railroad was constructed in a city under a franchise from it and has since been maintained. Under the provision of the Code quoted, it was held that another company having a like franchise was entitled to intersect the tracks of the first company and operate cars thereon jointly with it, upon the payment to it of one-half the value of the tracks and appurtenances at the time the later company was permitted to make use of them. Cook v. Los Angeles Ry. Co., 129 Cal. 180, 61 Pac. 912.

Under the Ohio statute (Rev. Stat., §§ 3438, 3440, as amended April 11, 1890 [87 Ohio Laws, 178]) it was held that legal appropriation of, and compensation for the use of, the tracks and substructures of one street railroad

the ordinary use of it, and the track privileges of an existing railroad company are sufficient for the business of two or more companies, they shall all be obliged to use them in common.<sup>7</sup> The statutory or other limitations upon a street railroad franchise generally do not make the consent of the abutting owners on that part of the street where the existing railroad tracks are to be used by another company, necessary to such use as if a new road were to be constructed.<sup>8</sup> In New

corporation by another, give the appropriating corporation the property right in such tracks and substructures; and a third corporation, by a contract with the original owner, can obtain no right, as against the appropriating corporation, to the use of said tracks and structures; but the fact that the corporation contracting with the original owner had not received any additional franchise from the municipality, or obtained the consent of the owners of more than one-half of the frontage of the abutting property, constituted no ground for enjoining such corporation from using the tracks, at the instance of the appropriating corporation, since such objections could be raised only by the abutting property-owners or the municipality. Toledo El. St. Ry. Co. v. Toledo N. V. Ry. Co., 7 Ohio N. P. 211, 1 Ohio S. & C. P. Dec. 33.

Under the Pennsylvania act a second street railway company may be chartered to run tracks over a bridge already occupied by a street railway company.

7. Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610, 56 Am.

& Eng. R. Cas. 513. Under the California statute in no case may a street be occupied by two railroads, whether belonging to corporations or private persons, for a distance of more than five blocks, and an ordinance permitting it is void. People v. Risch, 54 Cal. 74.

8. State v. Cincinnati & Hel. St. R. Co., 19 Ohio Cir. Ct. 79, 10 O. C. D. 418. In the case cited it was also held that the right of a city to give a railroad company the privilege of using the tracks of another company under its statutes (Rev. Stat., § 3438) is not affected by the fact that the existing railroad runs over a bridge on a public highway in the city, which bridge was erected by the county commissioners, and that the statutes conferring power upon a railroad company to make traffic arrangements with another company owning or operating a line of surface railroad within the same city did not interfere with the right of the one to appropriate, by proper statutory proceeding, the joint use of the track of the other. It was also decided that where a street railroad company may construct a street railroad, partly within and partly without a municipality, and

York however the rule is different. Ever since 1839 a statute has existed making it lawful for any railroad corporation to contract with any other railroad corporation *for the use* of their respective roads, *and thereafter to use* the same in such manner as may be prescribed in such contract. This statute now forms part of section 78 of the Railroad Law.<sup>9</sup> The consent of local authorities and property-owners to the construction of street surface railroads in city streets was not required until 1854,<sup>10</sup> and upon a review of all the legislation upon the subject, it is held by the Court of Appeals that neither the

has obtained the right to construct its railroad over certain streets within the city and also (from the county commissioners) had obtained the right to construct its road on highways outside the city, and does so, and the city authorities grant it the right to extend its tracks in the city, and to occupy the tracks of an existing railroad therein under the act granting the right for not more than one-eighth the distance between the termini of the road, the part of said railroad outside the city, actually constructed, operated and run over, as well as that part so used within the city, may be estimated to determine whether the parts so used are more than eight times the length of that part of the existing railroad track which it is authorized to use.

By accepting a municipal consent to the construction of its tracks on condition that certain other railroads may use its tracks, a street railroad company authorizes such use of its tracks in advance of its construction. S. I. M. R. Co. v. S. I. El. R. Co., 34 App.

Div. (N. Y.) 181, 54 N. Y. Supp. (88 St. Rep.) 508.

A railroad company may construct a curve connecting the tracks of two other companies, in pursuance of a contract to do so in consideration of the right to use such curve and the tracks of said companies without the consent of the property-owners or local authorities. Kunz v. Brooklyn Heights R. Co., 25 Misc. Rep. (N. Y.) 334, 34 N. Y. Supp. (88 St. Rep.) 187.

9. 3 Heydecker's Gen. Laws (2d ed.), 3302, § 78, chap. 565 of 1890, § 78, as amended by chap. 676 of 1892, and chap. 433 of 1893, § 2.

10. Laws of 1854, chap. 140, § 1, provided that "the common councils of the several cities of this State shall not, hereafter, permit to be constructed in either of the streets or avenues of said city a railroad for the transportation of passengers, which commences and ends in said city, without the consent thereto of a majority in interest of the owners of property upon the streets in which said railroad is to be constructed being

consents of local authorities nor property-owners is required to the *operation* by one railroad company of its cars over the tracks of another railroad company by virtue of a traffic contract with such other railroad company, but that such consents are required to the construction, maintenance, or operation of new railroad tracks constituting either main line, branches, or extensions, and that such consents are also required before one railroad can apply to acquire the right to use the connecting track of another company by a proceeding *in invitum* under section 102 of the Railroad Law.<sup>11</sup> A

first had and obtained." And this section is substantially re-enacted in section 91 of the Railroad Law of 1890. For section 91, see *ante*, p. —.

11. Ingersoll v. Nassau El. R. Co., 157 N. Y. 453, 52 N. E. 545; Colonial City T. Co. v. Kingston R. Co., 153 N. Y. 540, 47 N. E. 810, reaffirmed on reargument, 154 N. Y. 493.

In the Ingersoll Case the court, per Chief Justice PARKER (page 467), said: "When the legislature incorporated chapter 218, Laws of 1839, into the General Railroad Act, and provided that it should constitute a continuance of that chapter and not a repeal and re-enactment thereof, it made it perfectly clear that it was the legislative intent not only that such a right should thereafter be continued to all railroad corporations created under and by virtue of the provisions of the general law, but that it should preserve the statute from even an opportunity of controversy as to whether it was in violation of the spirit of the constitutional amendment of 1874.

That amendment did not, as we have seen, affect past legislation, and therefore could not, by any possibility, be said to affect a provision of law upon that subject that should be continued in a general railroad law instead of being re-enacted. So, too, it continued the legislation upon the subject of the consents of the municipalities and also the legislation upon the subject of the consent of the abutting owner. It is quite evident that it was the legislative understanding that these several enactments were in harmony with each other and could stand together, and there really does not seem to be any room for questioning it; but if there were, it would be the duty of the courts to harmonize the enactments. No such effort however is needed. By the General Railroad Law, in order to acquire the right to construct, extend, or operate a railroad upon a public street, there must be obtained, *first*, consent of the municipal authorities; *second*, consent of a majority in interest of the abutting owners, or, if that cannot be

street railroad company is not precluded from maintaining proceedings to condemn the right to use a portion of the tracks of another company until it obtains an additional grant from the city, by its previous condemnation of the right to use a different portion of the same tracks,<sup>12</sup> unless by so doing it exceed the statutory or otherwise properly imposed limit for such use. In an action by a street railroad company against another like company to appropriate a right of way in the tracks of the latter, the question whether plaintiff has

had, the consent of the Appellate Division. When these consents have been obtained and the railroad corporation obtaining them has in all other respects complied with the commands of the General Railroad Law, it acquires what is known as a franchise, and one of the important features of that franchise consists in the right to contract with another corporation for the use of its tracks, which right becomes a part of the franchise.

"Thus reading together the several sections of the Railroad Law, and we see no other way in which they can possibly be read except by eliminating absolutely from consideration the oldest and most firmly grounded of all the statutes we have referred to, we come necessarily to the conclusion that the court below was right in holding that the Atlantic Avenue Railroad Company, when it acquired its franchise, secured as a part of it the right to contract with another railroad company to use its tracks, a right that neither the municipality nor the abutting owner could take away or impair."

Two railroads may make a contract by which one grants to the other the right to use its tracks for the passage of cars to another part of the system of the grantee, which does not name any definite period, but provides for the annual payment for the maintenance of the tracks used; and the contract is not a lease requiring the consent of the stockholders, but a traffic contract. *Chapman v. Syracuse Rapid T. R. Co.*, 25 Misc. Rep. (N. Y.) 626, 56 N. Y. Supp. (90 St. Rep.) 250.

The case last cited also held that one cotenant of railroad tracks which is bound not to "let, sublet, sell, assign, or convey" any interest in its railroad without the consent of the other cannot, without such consent, make a traffic contract with another railroad which will give a permanent easement over the tracks. In such case the silence or acquiescence of the other cotenant constitutes a mere temporary license.

12. *Toledo Consolidated Street R. Co. v. Toledo El. St. R. Co.*, 12 Ohio C. C. 367, 1 O. C. D. 643.

obtained the consent of the majority of the abutting property-owners prior to the grant of its franchise by the council cannot be determined in Ohio; that question is for the council, which had special charge of the subject.<sup>13</sup> When an ordinance of a city designated a certain street for use by the railroad company and provided that if the city should thereafter grant any other company the privilege to operate a street railroad in the same street it might permit such company to use the tracks of the former company upon making proper compensation, the city authorities may grant the right to the latter company to propel its cars upon said tracks by electricity, although the use thereof for power was unknown when the ordinance was passed and although some disturbance and injury to the former company might result thereby.<sup>14</sup>

13. *Consolidated St. R. Co. v. Toledo El. St. R. Co.*, 6 Ohio N. P. 537, 8 Ohio S. & C. P. Dec. 268. Owner is not entitled to further compensation because of such additional use. *Miller v. Green Bay, etc., R. Co.*, 59 Minn. 169, 11 Am. R. & Corp. Rep. 246, 26 L. R. A. 443, 60 N. W. 1006.

14. *New Baltimore Pass. Ry. Co. v. N. Ave. Ry. Co.*, 4 Am. Electl. Cas. 1, 75 Md. 233, 23 Atl. 466. And see *Canal & Claiborne R. Co. v. Crescent City, etc., Co.*, 4 Am. Electl. Cas. 13, 44 La. Ann. 485, 10 So. 389. In the case last cited the court said "that the track was originally constructed for horse cars, and was not strong enough to bear the weight of electric cars, is no reason why they should not be placed on the track. There are constant improvements in the mode of travel. New and im-

proved conveyances are daily coming into use. Public convenience and necessity require the adoption of the most improved methods. The streets belong to the public. Their use for the public cannot be abridged. Hence, when the municipal government in its discretion sees the necessity of permitting the use of the streets by improved cars, driven at greater speed by a new motor, no one can complain, as no franchise can be granted over a street exclusively to any one for the continued use of any particular kind of conveyance.

"The electric motor is but one means of using the streets, and the permission to use the electric cars is established for the public convenience, and is the exercise of the police power of the city over its public places. It cannot be questioned, unless, as stated above,

A connection between a street surface railroad and an elevated railroad, by an inclined plane, is not a joining or union in the sense of section 4 of the New York Railroad Law, and therefore highway commissioners cannot authorize the erection by a street surface railroad corporation, upon a public highway, of an elevated inclined plane in order to connect its track with an elevated railroad. The consent of abutting owners as well as of the local authorities are essential to the legality of such an erection.<sup>15</sup> A street railroad company which has provided by contract for the running of cars by another company over its tracks to a depot which it uses for a steam railroad is not, without express provision, thereby prevented from selling its franchises and right to a rival of the other company, although the purchaser proceeds under the franchise to construct a line between the depot and the ferry which had previously been reached only by such other company.<sup>16</sup> The just compensation to be made where one railroad company condemns the use of the tracks of another company for its own road is to be ascertained according to the statute and practice of the State under whose laws they hold their franchises. In Missouri it is held that the compensation covers all such damages as are necessarily incident to the connection of the lines of the two companies, in accordance with the plan proposed, and to the use, by the connecting company, of such cars as it operated on its own track, at the time the connection was made, although the

its use evicts the company which owns the roadbed and material in place from its property."

15. Eldert v. The Long Island El. R. Co., 28 App. Div. (N. Y.) 451.

16. P. P. & C. I. R. Co. v. C. I. & B. R. Co., 144 N. Y. 152, 26 L. R. A. 610, 63 St. Rep. (N. Y.) 48, 1 Am. & Eng. R. Cas. (N. S.) 222, 39 N. E. 17; Atlanta Ry. & P. Co. v. Atlanta Rapid Transit Co. (Ga.), 39 S. E. 12.

manner of the connection and the width of the defendant's cars necessarily caused more or less delay. Loss of passengers cannot be considered, nor should any portion of the special franchise tax paid by the company whose tracks are to be used be included in the compensation. The compensation should be based on the value of the road whose tracks are to be used at the time of the proceeding and not upon the original cost of the building of the road.<sup>17</sup> In fixing the compensation to be paid by an electric street railroad company for the use of the track of a cable railroad, such use being authorized by statute, it is proper to base the rental upon the actual cost of the cable road, including cost of the conduit, although the conduit was in no way useful to the electric company and the cost of construction of the conduit was three-fourths the cost of the whole roadway. The cable road company should be made good for its loss, to wit, the deprivation of the use of the road, without reference to the benefit of the electric company.<sup>18</sup> Statutes prohibiting a

17. People's R. Co. v. Grand Ave. R. Co., 149 Mo. 245, 50 S. W. 829; Grand Ave. R. Co. v. Citizens' R. Co., 148 Mo. 665, 50 S. W. 305; Grand Ave. R. Co. v. Lindell R. Co., 148 Mo. 637, 50 S. W. 302. It was further held that the proceeding provided by the ordinance of the city of St. Louis for the purpose of securing to a street railroad company full and fair compensation for any injury which it might suffer by reason of the delays and inconveniences resulting from the exercise by another company of its road under the charter to connect its tracks with, and pass its cars over, the tracks of the former company, is a valid and adequate one, and excludes all other

remedies. 149 Mo. 245, 50 S. W. 829. And see Grand Ave. R. Co. v. People's R. Co., 132 Mo. 34, 33 S. W. 472, 12 Am. R. & Corp. Rep. 594. It appeared that the road was originally constructed as a cable road and the use of it for such purpose had been abandoned; it was also held that if the connecting railroad is charged with the total costs of paying the switchmen necessary for making connections with the other company's track, and is made responsible for making such connections, it should be allowed to select such switchmen.

18. Grand Ave. Ry. Co. v. People's Ry. Co. (Mo. Sup. Ct.), 6 Am. Electl. Cas. 99.

street surface railroad company from leasing its rights or franchises to any other company owning or operating a road parallel thereto does not preclude a traffic arrangement between two companies for the partial use of their respective routes beyond the line of parallelism.<sup>19</sup> In the absence of authority acquired as provided by statute or by condition in the ordinance granting the franchise one street railroad company cannot use the tracks of another company without its consent and will be prohibited from so doing by injunction.<sup>20</sup>

**§ 10. Crossing other tracks.**—The right of a railroad company to cross or occupy any part of the streets of a city constitutes a mere easement. It gives no title to the street itself. Therefore a street railway company operating under proper municipal authority may construct its lines across the tracks thereof without instituting condemnation proceedings or paying damages therefor unless the statute provides to the contrary.<sup>21</sup> The railroad whose tracks are crossed

19. *People v. O'Brien*, 111 N. Y. 1, 64, 18 N. E. 692, 36 Am. & Eng. R. Cas. 78, 7 Am. St. Rep. 684; *Canal, etc., R. Co. v. Orleans R. Co.*, 44 La. Ann. 54, 10 So. 389, 50 Am. & Eng. R. Cas. 369.

20. *Met. R. Co. v. Quincy R. Co.*, 12 Allen (Mass.), 262; *Louisville City R. Co. v. Central Pass. R. Co.*, 87 Ky. 223, 8 S. W. 329, 36 Am. & Eng. R. Cas. 463; *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61, 21 id. 550; *Central City Horse R. Co. v. Fort Clark Horse R. Co.*, 81 Ill. 533; *Boston, etc., R. Co. v. Salem, etc., R. Co.*, 2 Gray (Mass.), 1.

21. *Southern Ry. Co. v. Atlanta Ry. & P. Co.*, 111 Ga. 679, 36 S. E. 873; *Morris & Essex R. Co. v. Newark Pass. Ry. Co.*, 5 Am. Electl. Cas. 229, 51 N. J. Eq. 379; *N. Y., N. H. & H. R. Co. v. Bridgeport T. Co.*, 5 Am. Electl. Cas. 246, 65 Conn. 410, 29 L. R. A. 367, 32 Atl. 953. In the case last cited it was also held that the fact that an electric street railroad company threatens to construct a grade crossing of a steam railroad, in constant use, which will disarrange plaintiff's train service, put it to great additional expense in the construction of its road and

cannot complain because the street railroad company crossing is permitted to operate an electric line; it must submit to the inconvenience that may result from the growth and development of the city and the consequent increase of and change in the modes of travel.<sup>22</sup> Either by statute or by condition properly prescribed in the ordinance granting the

greatly endanger the lives of its passengers and employees, is sufficient for an injunction, irrespective of the street railroad company's pecuniary responsibility. And see Chicago & C. Terminal R. Co. v. Whiting, etc., St. R. Co., 139 Ind. 297, 47 Am. St. Rep. 264, 11 Am. R. Corp. Rep. 507, 1 Am. & Eng. R. Cas. (N. S.) 181, 26 L. R. A. 337, 38 N. E. 604; C. B. & Q. R. Co. v. W. Chicago St. R. Co., 156 Ill. 255, 29 L. R. A. 485, 12 Am. R. Corp. Rep. 522, 40 N. E. 1008; Brooklyn Cent., etc., R. Co. v. Brooklyn City R. Co., 33 Barb. (N. Y.) 420; New York, etc., R. Co. v. Forty-second St. R. Co., 50 Barb. (N. Y.) 309; Market St. R. Co. v. Cent. R. Co., 51 Cal. 583; Highland Ave., etc., R. Co. v. Birmingham Union R. Co., 93 Ala. 505, 50 Am. & Eng. R. Cas. 422, 9 So. 568.

A street railway company limited by statute to operate in established streets and highways cannot, under a statute permitting it to cross steam railroads at grade, make such crossing without the consent of the steam railroad company at any place other than an established street or highway; neither can it make an overhead crossing or viaduct except subject to the same limitations. Northern Central Ry. Co. v. Harrisburgh,

etc., Co. (Pa. Sup. Ct.), 6 Am. Electl. Cas. 187.

The maintenance of a viaduct over a steam railway and the operation of electric street cars over the same must cause an appreciable cause of danger to the steam railway company, its patrons and employees; an injunction is proper to prevent the unauthorized construction of such viaduct. *Id.*

22. Southern Ry. Co. v. Atlanta Ry. Co., *supra*. It was also held that the charter of a street railroad company granted by the secretary of state and confirmed and validated by the chancellor made the company one "chartered by the legislature" within Civil Code, § 2219, permitting any railroad company "heretofore or hereafter chartered by the legislature of the State to cross the tracks of any other company under certain conditions."

A street railroad may cross "at grade diagonally or transversely, any railroad operated by steam or otherwise" in Pennsylvania, and a railroad of the latter class will be restrained from interfering with the street railroad so attempting to cross. Buffalo, etc., R. Co. v. Du Bois T. Pass. R. Co. (Pa. C. P.), 24 Atl. 179, 1 Pa. Adv. Rep. 755.

franchise to the one railroad company the right is reserved to any other railroad company to cross its tracks upon making just compensation. This statutory right however does not permit the commingling of tracks for four hundred feet or more along a thirty-foot right of way, making it impracticable to operate either track or set of tracks when any one of the other tracks is being actually used.<sup>23</sup> Whether a steam road crossing a highway in the town should be intersected by a street railroad at the same point is a question to be determined by the authorities of the town in which the crossing is located. The authorities of some other town or village through which the street railroad passes has no power to consent and are not concerned in the question unless of course either by statute or ordinance properly applicable, such consent is made a prerequisite. The regularity of a proceeding by which a street railroad company seeks the right to cross the tracks of a steam railroad company at the point where the latter tracks intersect the highway on which the street railroad is constructed must be determined by the statute as it stood when the application is made; a subsequent amendatory statute, prospective in its operation, and precluded from retroactive effect, has no pertinency.<sup>24</sup> In con-

23. Seattle & M. R. Co. v. State, 7 Wash. 150, 22 L. R. A. 217, 34 Pac. 551. Section 216 of the Kentucky Constitution applies to street railroads and restricts the right of such road to cross within a city the tracks of a steam railroad to a case where the crossing is reasonable and feasible. Louisville & N. R. Co. v. Bowling Green Ry. Co. (Ky.), 63 S. W. 4.

24. G. & W. Ry. Co. v. N. Y. C. & H. R. R. Co., 163 N. Y. 228, 57

N. E. 498. In the case cited it was held that where a street railroad company running for seven miles through two separately constituted villages and also through a town where the crossing in question was located, obtains the consent of the highway commissioners of the town to the construction of the street railroad on the town highway, the consent is sufficient, and the failure to obtain the consent of the local authorities of the vil-

sidering the effect of the decisions of any State court the statute relative to the matter must of course be considered; and in the note hereto a number of decisions are collated from the several States.<sup>25</sup> In New Jersey a street railroad

'lages is immaterial since they could have no force.

25. In New Jersey the statute of 1895 (Gen. Stat., p. 2717) authorizing the chancellor to define the mode in which one railroad may cross another requires that the lawful route of the petitioning company should cross the line of railroad belonging to the other company; and where the intersecting extension of the petitioner street railroad company's line is unauthorized by its charter, the chancellor's jurisdiction does not attach. *Trenton St. Ry. Co. v. United N. J. R. & C. Co.*, 46 Atl. 763. The petitioner must show in the proceeding before the chancellor, under this statute, by due proof, that his application is within the terms of the statute, and a petition, verified by affidavits, and served under rule 138 of the Court of Chancery, providing that affidavits and objections duly sworn to may be used on the hearing of a railroad to show cause, cannot be accepted as competent proof of the corporate existence of the street railroad, or of the grant alleged to have been made by a turnpike company to it for the use of its road. *Re Trenton St. Ry. Co.* (N. J.), 44 Atl. 177.

On an application under that statute to define the mode of crossing a steam railroad by the trolley road a map filed by the petitioner showing that the route of the trolley

road crosses the railroad at the point where the mode of crossing is to be defined, is sufficient, though it does not exhibit any indication of a crossing. On such proceeding the question is whether taking into account the danger of collision and facility and economy with which it may be avoided by adopting a crossing other than at grade, the latter method should be required. *Re W. Jersey T. Co.* (N. J.), 45 Atl. 282.

The right of a street surface railroad company to have its tracks intersect with those of a steam railroad company is provided for by section 4 of chapter 676 of the Laws of 1892, notwithstanding the fact that the steam railroad company has title in fee to the line at that place in the street subject to the easement of the public; the right of crossing the tracks is not necessarily inconsistent with the purpose to which the line was originally appropriated; and the objection to the proposed crossing of the tracks on the ground that it will interfere with the use by the steam railroad of its tracks, presents a question for the consideration of the commissioners in condemnation proceedings. *Hornellsville R. Co. v. N. Y., L. & W. R. Co.*, 83 Hun (N. Y.), 407. And see *Buffalo B. & L. R. Co. v. Same*, 72 Hun (N. Y.), 587, 54 St. Rep. (N. Y.) 877, 25 N. Y. Supp. 155. In Georgia it is held

company may cross the tracks of another company without making compensation, although any of the methods of crossing which the safety and convenience of the public requires involves an actual interference with the tracks and rails of the latter company and involves the joint use of tracks and rails at the point of crossing by the second company.<sup>26</sup> The provision of the New York Railroad Law requiring a street surface railroad before constructing any part of its road upon or through any "private property," to file a map or profile of its proposed route through it, applies to the crossing of the right of way of a steam railroad; such map or profile however need not show the route through the lands of any other persons or corporations in order to obtain the cross-

that a grant to a railroad company of the right to construct its road between two cities, and to cross one of them to connect its road with that of another company, does not authorize it to lay its tracks longitudinally upon the streets of such city. *Davis v. East Tenn., V. & G. R. Co.*, 87 Ga. 607, 10 Ry. & Corp. L. J. 393, 13 S. E. 567.

A railroad company can be restrained from constructing an additional track across a street laid out across its track after the latter was constructed where for years it had maintained a crossing. *Brunswick & W. R. Co. v. Waycross*, 88 Ga. 68, 13 S. E. 835.

26. *Consol. T. Co. v. S. Orange & M. T. Co.*, 7 Am. Electl. Cas. 390, 56 N. J. Eq. 569, 40 Atl. 15. And see *Gen. El. Co. v. Chicago City R. Co.*, 66 Ill. App. 362, 12 W. C. R. 750, 28 Chic. Leg. N. 406.

In Pennsylvania it is held that, although the traffic of a traction company has so increased with the

growth of a city that two grade crossings maintained by it across the tracks of a railroad company are insufficient does not constitute such an imperious necessity as will authorize it to make additional crossings at grade. Whether an overhead crossing of the tracks of a railroad company by those of a traction company is reasonably practicable is not to be determined by the financial ability of the road seeking to cross, but by the physical practicability of avoiding a grade crossing. *Chester Traction Co. v. Philadelphia, etc., Co.*, 188 Pa. St. 105, 7 Del. Co. Rep. 281, 43 W. N. C. 249, 41 Atl. 449.

A street railway company has the right to diverge from the highway and to construct its railroad on property secured for that purpose in order to avoid a grade crossing at the intersection of a railroad. *Pa. Ry. Co. v. Glenwood & D. El. St. R. Co.*, 184 Pa. St. 227, 41 W. N. C. 441, 39 Atl. 80.

ing.<sup>27</sup> In many States application must be made to the State railroad commission before the crossing of steam railroad tracks by a street railroad will be allowed.<sup>28</sup> If the corpora-

27. D., L. & W. R. Co. v. Syracuse, L. & B. R. Co., 28 Misc. Rep. (N. Y.) 456, 59 N. Y. Supp. (93 St. Rep.) 1035.

28. New York Railroad Law, § 60, as amended by chap. 754, Laws 1897; 3 Heydecker's Gen. Laws (2d ed.), 3289. And see Louisville & N. R. Co. v. Bowling Green Ry. Co. (Ky.), 63 S. W. 4; Cincinnati & H. El. St. R. Co. v. Cincinnati, H. & I. R. Co. (Ohio), 12 O. C. D. 113; Board of Railroad Comrs. v. Market St. Ry. Co. (Cal.), 64 Pac. 1065.

A New York law provides:

"1. Whenever the railroad or route of any street surface railroad corporation shall intersect and cross, or shall cross the tracks and roadbed of any railroad, operated by locomotive, steam or other power, which are laid in, across or upon the surface of any street, avenue, road or highway in any city, town or village of the state, having less than five hundred thousand inhabitants, and such street surface railroad corporation having been unable to agree with the corporation owning the tracks and roadbed so intersected or to be intersected and crossed, as to the line or lines, grade or grades, points or manner of such intersection and crossing, or upon the compensation to be made therefor, shall have applied to the court by petition to appoint commissioners to determine the same, the court shall upon application made by such

street surface railroad corporation, at, or after, the time of the appointment of such commissioners, or if an answer to the petition of such street surface railroad corporation has been interposed, at any time thereafter, direct that such street surface railroad corporation, be permitted to lay its tracks across and to intersect, upon the surface of the street, avenue, road or highway, the tracks and roadbed of such railroad operated by locomotive, steam, or other power, provided, such street surface railroad corporation shall at the time of obtaining such order make and file with the clerk of said court, its bond or undertaking in writing, in an amount and with surety or sureties to be approved by the court, conditioned for the full and faithful performance by such street surface railroad corporation of any and all conditions and requirements which may be imposed by said commissioners and be affirmed by the court, in determining the line or lines, grade or grades, points or manner of such intersection and crossing and as to the amount of compensation to be paid therefor, and also conditioned to conform such crossing and intersection made by virtue of such order of the court to the requirements made by said commissioners as affirmed by the court."

"2. No street surface railroad shall be allowed to lay its tracks at grade across the tracks or road-

tions whose roads intersect cannot agree upon the compensation to be made by the company seeking to make intersections or connections, the statute generally provides that the compensation shall be ascertained and determined by commissioners as in condemnation proceedings. In New York, the defendant railroad company in such proceeding cannot appeal from an order appointing commissioners, as, under the Condemnation Law of that State, the defendant can only appeal from a final order in the proceedings.<sup>28½</sup>

bed of any railroad operated by locomotive steam power at any point where there are three or more tracks of the steam road proposed to be crossed, which tracks have been constructed and in operation at least two years, unless the written consent of the state railroad commissioners be first obtained for such crossing at grade. But this section shall not affect the operation of section one of this act in any suit or proceeding now pending nor any renewals of said pending suit or proceeding brought for any cause." (And see chap. 239 of 1893, 4 Heydecker's Gen. Laws [2d ed.], 4826, 4827.)

28½. Stillwater, etc., R. Co. v. M. & M. R., 67 App. Div. (N. Y.) 367; appeal dismissed on the ground that the order appealed from was a discretionary order. 170 N. Y.

The statute, Railroad Law, § 12, 3 Heydecker's Gen. Laws (2d ed.), p. 3259, provides as follows:

"**§ 12. Intersection of other railroads.**—Every railroad corporation, whose road is or shall be intersected by any new railroad, shall unite with the corporation owning such new railroad in form-

ing the necessary intersections and connections, and grant the requisite facilities therefor. If the two corporations cannot agree upon the amount of compensation to be made therefor or upon the line or lines, grade or grades, points or manner of such intersections and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer and surveyor, to be appointed by the court, as is provided in the condemnation law. Such commissioners may determine whether the crossing or crossings of any railroad before constructed shall be beneath, at, or above the existing grade of such railroad, and upon the route designated upon the map of the corporation seeking the crossing or otherwise. All railroad corporations whose roads are or shall hereafter be so crossed, intersected or joined, shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective roads, with the same dispatch as, and at a rate of freight not exceeding the local tariff rate charged for similar goods,

**§ 11. Use of turnpikes, bridges, etc.**—A street surface railroad company may contract with a turnpike company for compensation to be paid to the latter company for the use of its turnpike on which to place a street railroad.<sup>29</sup> But wherever the Constitution or a statute prohibits such railroad company from constructing or maintaining its road in a highway without the consent of the “local authorities,” a turnpike company’s consent to the use of its turnpike for street railroad purposes is futile unless the consent of the “local authorities” is also obtained.<sup>30</sup> Such a railroad corporation may be given the right to condemn a necessary easement for the operation of its railroad over the turnpike of another corporation and may also condemn the right to use electricity as a motive power thereon instead of its already acquired use of horse power.<sup>31</sup> In the proceeding to condemn however the turnpike company may interpose the objection that the necessary consent of local authority has not been obtained.<sup>32</sup> The just compensation to be paid must be determined as in any other case. The value of the entire

merchandise and other property, received at or forwarded from the same point for individuals and other corporations. (As amended by chap. 676 of 1892.)”

29. Little Saw-Mill Valley Turnpike or Plank R. Co. v. Federal St., etc., R. Co., 194 Pa. St. 144, 45 Atl. 66; Hunt v. West Jersey Trac. Co. (N. J. Ch.), 49 Atl. 434.

30. *Re Rochester El. Ry. Co.*, 123 N. Y. 351, 33 St. Rep. (N. Y.) 695, 25 N. E. 381; Harrisburg, etc., El. Ry. Co. v. Harrisburg, etc., Tp. Co., 5 Am. Electl. Cas. 1, 15 Pa. Co. Ct. 389; Borough of Steelton v. E. Harrisburg Pass. Ry. Co., 2 Dauph. Co. Rep. (Pa. C. P.) 313;

Middletown, etc., St. Ry. Co. v. Middletown, etc., El. Ry. Co., 2 Dauph. Co. Rep. (Pa. C. P.) 319.

31. Baltimore, etc., Tp. Road v. Baltimore, etc., R. Co., 81 Md. 247, 3 Am. & Eng. R. Cas. (N. S.) 177, 31 Atl. 854.

32. Harrisburg, etc., R. Co. v. Harrisburg, etc., Tp. Co. (Pa. C. P.), 15 Pa. Co. Ct. 389, 4 Pa. Dist. 17.

But the question of forfeiture, by *laches*, of the charter right so to lay its tracks cannot be considered as the State alone can move for such forfeiture. Tp. Co. v. Jenkintown El. R. Co. (Pa. C. P.), 4 Pa. Dist. 8.

property of the turnpike company is not admissible on the question of value of a very small portion thereof in which the right is sought to be acquired, the character and productiveness of the other parts not being shown; nor is it material what the street car company agreed to pay for its occupation of the turnpike.<sup>33</sup> In Pennsylvania it is also held that the use of a public tollbridge for an electric railroad upon payment of adequate tolls is not a taking of or injury to the property in the exercise of the power of eminent domain.<sup>34</sup> And the county commissioners cannot arbitrarily refuse such use of a county bridge when the proper local authorities have given their consent to the use of the highway of which the bridge forms a part.<sup>35</sup> Of course if the bridge is not strong enough to admit of such use, a refusal by the county commissioners on that ground would not be arbitrary. But the court might ascertain what would be necessary to strengthen the bridge for such traffic and then permit the railroad company to enter upon the bridge and strengthen it, and when that has been done to the satisfaction of the court the company may be permitted to use the bridge upon giving security that it will faithfully observe and abide by the terms and conditions relating to the manner of its use, the repairs thereof and the payment of rent which may have been made, or may be agreed upon by the parties,

33. Pres., etc., Perkiomen & R. Tp. Rd. v. Berks Co., 196 Pa. St. 21, 46 Atl. 98.

34. Pittsb. Pass. R. Co. v. Point B. Co., 165 Pa. St. 37, 26 L. R. A. 323, 25 Pittsb. L. J. (N. S.) 192;

35 W. N. C. 393, 30 Atl. 511. But a railroad company must see that the overhead bridge over railroad tracks crossed by its road is safe before it will be allowed to con-

struct its tracks thereover where the bridge was not originally built for such purpose. Pa. R. Co. v. Greenburgh J. & P. St. R. Co., 176 Pa. St. 559, 27 Pittsb. L. J. (N. S.) 134, 35 Atl. 122.

35. Lawrence Co. v. Newcastle El. St. R. Co., 8 Pa. Super. Ct. 313, 52 Pittsb. L. J. (N. S.) 145, 43 W. N. C. 76.

or, in the absence of an agreement, may be determined upon by the court.<sup>36</sup> In New York under the statutes by which municipal corporations like villages and cities are organized the bridges within the municipalities remain under the control of the highway commissioners of the respective towns out of which the municipalities are carved. And the consent of the municipal authorities to the construction of a street railroad in the street including the bridge does not authorize the railroad company to lay its tracks upon the bridge itself without the consent of the highway commissioners of the town.<sup>37</sup> A release by a turnpike company of all its interest

36. Lawrence Co. Case, *supra*. In the case cited the court also said that there was a manifest difference between the refusal of an interlocutory judgment restraining a street railroad company from laying an additional track upon a county bridge forming a part of a highway, the use of which has been granted to the company by the proper local and municipal authorities, and the granting of express permission to go on with the work; and the granting of such permission against the objection of the county before a determination as to what is necessary in order to make the bridge safe for street railway traffic is erroneous, although a mere interlocutory injunction may be improper because of the absence of immediate danger of irreparable injury.

A portion of a causeway belonging to a bridge company was condemned for depot purposes with a condition that it should be "subject to whatever rights of crossing the same now exist by law;" held,

that this did not include the right to construct a street railroad across such grants. N. Y., N. H. & H. R. Co. v. Fair Haven & W. R. Co., 70 Conn. 610, 40 Atl. 607, 41 id. 169.

37. Town of Lysander v. S. L. & B. R. Co., 31 Misc. Rep. (N. Y.) 330, 65 St. Rep. (N. Y.) 415; affd., 51 App. Div. 617, 66 St. Rep. (N. Y.) 1146. In the New York Railroad Law provision is made for the extension of street railroad routes over rivers and for the use of bridges as follows:

"§ 96. Extension of route over rivers; terminus in other counties; when property-owners withhold consent; supreme court may appoint commissioners.—Any street railroad in operation in this state, which shall, by a two-thirds vote of its directors, decide to extend the route of its road, so as to cross a river over and by any bridge now or hereafter constructed under the provisions of any law of this state, may so extend their route over and across

in that portion of its road occupying the bed of a street, releases also the franchise which it has previously purchased

such bridge upon such terms as may be mutually agreed upon between it and such bridge company, and may locate the terminus of their road in the county adjoining the one in which their road is now located and in operation, upon first obtaining the consent of such bridge company or its lessees, and the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad, or in case the consent of such property-owners cannot be obtained the appellate division of the supreme court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine after a hearing of all parties interested, whether such railroad ought to be constructed, or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property-owners. Whenever a terminus of any public viaduct, bridge or bridges, or public viaduct connected with any bridge or bridges, heretofore or hereafter constructed in and owned and maintained by any city of the first class, or town adjoining the same, is or shall be located at or adjacent to or within one-half mile of the route of any existing street surface railroad, the corporation owning or operating such railroad may, irrespective of any provisions

otherwise applicable thereto contained in any general or local act, upon obtaining the consent of the local authorities and property-owners as above provided, and upon complying with the provisions of the Railroad Law applicable thereto, extend its road or route and construct and operate its railroad, to, upon and across such viaduct, bridge or bridges and approaches thereto for the purpose of connecting with another railroad route not more than one-half mile distant from such bridge or viaduct so as to afford a continuous ride for one fare, subject to the provisions of the Railroad Law, or for the purpose of reaching the depot, station or terminus of another railroad not more than one-half mile distant from such bridge or viaduct. This section shall not apply to any bridge over the Hudson or East rivers in the counties of New York and Kings, nor to any bridge or viaduct constructed under the provisions of any so-called Grade Crossing Law." (Chap. 565 of 1890, § 96, as amended by chap. 590 of 1898, § 1, as amended by chap. 419 of 1901, § 1. See 3 Heydecker's Gen. Laws [2d ed.], 3315.)

**"§ 110. Right to cross bridge substituted for a bridge crossed for five years.—** Should any street surface railroad company have crossed any bridge as a part of its route for a period of more than five years and should any other bridge be substituted therefor at

for the laying of a passenger railroad track along its road.<sup>38</sup> A grant by a turnpike company to an electric railroad company of its right to operate its lines over the turnpike, "not however by the use of steam, for the transportation of passengers and such bundles and parcels as are now customary to be carried on the city and suburban electric railway lines, but not for the transportation of heavy freight," does not entitle the railroad company to run a car upon the turnpike designed for general freight.<sup>39</sup> A city may lawfully acquire a turnpike road as a street, and may change the grade of such street without regard to a contract antedating its acquisition of such street between the turnpike company and a street surface railroad company whose road had been constructed thereon.<sup>40</sup>

**§ 12. Motive power.**— Electricity is supplanting other modes of traction upon street surface railroads to such an extent that it seems useless to consider the cases in various

any time, such company shall have the right to cross such substituted bridge and to lay and use railway tracks thereon for the transit of its cars and to make all changes and extensions of its route subject to all the provisions of this act, as the convenient operation of its cars and public convenience may require." (Added by chap. 676 of 1892. See Heydecker's Gen. Laws [2d ed.], 3323.)

38. West Phila. Pass. R. Co. v. Phila. & W. C. Tpk. Rd. Co. (C.P.), 6 Pa. Dist. R. 169; 19 Pa. Co. Ct. 225.

39. Prest., etc., B. & F. Tpk. Rd. v. United Rys. & El. Co. (Md. 1901), 48 Atl. 723.

40. Ridge Ave. Pass. R. Co. v. Philadelphia, 181 Pa. St. 592, 37

Atl. 910, 40 W. N. C. 453, 28 Pittsb. L. J. (N. S.) 55. And see F. & S. R. & T. Co. v. Fayetteville, 37 Misc. (N. Y.) 223, where it is also held that while a municipality may change the grade of a turnpike within its limits it should not proceed without notice or warning to tear up and partly destroy the turnpike, as the turnpike company's duty of maintaining the highway in a proper condition continued, and the municipality is liable to it in damages, if by its act the performance of this duty is made more onerous. An injunction was allowed restraining the village and the railroad company, defendants, from further interference with the roadway.

States wherein the question of the change in motive power from horse to electricity is discussed.<sup>41</sup> In nearly every State by statute electricity and generally any other motive power than locomotive steam power is expressly permitted;<sup>42</sup> and the particular motive power contemplated is usually prescribed by the charter or by ordinance completing the franchise. In New York the omission of the words "in value" after the word "property" in section 100 (cited in note 2 below), providing for the consent of "the owners of one-half of the property bounded on that portion of the railroad with respect to which a change of motive power is proposed" did not alter the law as it then existed so as to require the consent of the owners of one-half *the lineal frontage* of such prop-

41. The International Year Book of 1900 states: "The extent to which electricity is supplanting other modes of traction may be appreciated when we consider that while there is an increase of 2,027 miles or 12.7 per cent. in the length of the track of electric railways, there is a decrease of 46 miles or 12.2 per cent. in the mileage of cable railways, of 235 miles or 36.1 per cent. in the extent of horse railways, and of 83 miles in the mileage of lines using other sources of motive power."

42. The statute of New York (Railroad Law, § 100, chap. 565 of 1900, 3 Heydecker's Gen. Laws [2d ed.], 3317) is as follows:

"**§ 100. Motive power.**—Any street surface railroad may operate any portion of its road by animal or horse power, or by cable, electricity, or any power other than locomotive steam power, which said locomotive

steam power is primarily generated by the locomotive propelling the cars, and in the use of which either escaping steam or smoke is visible, which may be approved by the state board of railroad commissioners, and consented to by the owners of one-half of the property bounded on that portion of the railroad, with respect to which a change of motive power is proposed; and if the consent of such property-owners cannot be obtained, the determination of three disinterested commissioners, appointed by the appellate division of the supreme court of the department in which such railroad is located, in favor of such motive power, confirmed by the court, shall be taken in lieu of the consent of the property-owners. The consent of the property-owners shall be obtained and the proceedings for the appointment and the determination of the commission-

erty.<sup>43</sup> The tendency of the courts is to so construe statutes authorizing municipalities to grant the use of the streets within their limits for street railroad purposes as to give the local authorities practical control over the motive power to be employed. The public good requires that the common council of any city should be at liberty to place at the service of the public street railroads with all the valuable improvements in the means of propulsion which ingenuity and science from time to time discover, the matter of public safety and public inconvenience being left to be considered

ers and the confirmation of their report shall be conducted in the manner prescribed in sections ninety-one and ninety-four of this article, so far as the same can properly be made applicable thereto. Any railroad corporation making a change in its motive power under this section, may make any changes in the construction of its road or roadbed or other property rendered necessary by the change in its motive power. Where a street surface railroad in the counties of Herkimer and Hamilton is located wholly outside the limits of an incorporated city or village, such railroad may, with the approval of the state board of railroad commissioners, be operated by locomotive steam power, provided that such steam power is generated by oil from and including April fifteenth to and including November thirtieth, and by either oil or coal from and including December first to and including April fourteenth. (As amended by chap. 676 of 1892, chap. 584 of 1899, chap. 679 of 1900, and chap. 553 of 1901.)"

43. *Re Rochester & Lake Ontario R. Co.*, 51 App. Div. (N. Y.) 65, 64 St. Rep. (N. Y.) 429.

In the case cited the court said: "Had the legislature intended a radical change in the law, such as from value to frontage, it is probable words appropriate to express such intention would have been incorporated in the act. While it may not have been required by the Constitution, we think the intention of the legislature was to conform the practice in obtaining the consent of the property-owners to a change of motive power to that prescribed for obtaining their consent to the original construction and operation of the road, and we do not consider that the omission of these words from this section, occurring in the manner we have pointed out, manifests the change of such legislative intent." (Page 69.) But see to the contrary, *St. Mich'l P. E. Ch. v. Forty-second St., etc., R. Co.*, 26 Misc. Rep. (N. Y.) 601, 57 N. Y. Supp. 881.

by the common council.<sup>44</sup> It should be remembered however that as against the public grantor, the grantee must rely upon the express words in the statute, or upon a necessary implication. If there exist a doubt as to the extent of the grant, or any ambiguity as to its terms, such doubt must be resolved against and such ambiguity must operate against the grantee in favor of the public. Therefore a grant to use electric or chemical motors or grip cables as the propelling power of their cars instead of horses, provided the municipal authorities consent, does not legalize the erection of poles and the stretching of wires in the public street as a part of the system of electric railroading and an abutter owning to the middle of the street can use the writ of certiorari to test the validity of an ordinance which purports to confer the power to place such poles and wires upon his land lying in the street.<sup>45</sup> So a street railroad company, the articles of incorporation of which provide "that said railway is to be operated by horse power," cannot change to the overhead trolley system, and municipal corporations have no right to authorize such change.<sup>46</sup> Where the law expressly forbids a street railroad company to use the electric trolley system

44. See *Buckner v. Hart*, 4 Am. Electl. Cas. 21-23, 52 Fed. 835; *Reeves v. Traction Co.*, 4 Am. Electl. Cas. 24, 152 Pa. St. 153, 31 W. N. C. 265, 25 Atl. 516, 32 Am. L. Reg. 127.

45. *State, Green, Pros. v. Trenton*, 4 Am. Electl. Cas. 30, 54 N. J. L. 92, 23 Atl. 281. And see *Farrall v. Winchester Ave. R. Co.*, 61 Conn. 127, 23 Atl. 757; *Houston v. Houston B. & M. P. R. Co.*, 84 Tex. 581, 19 S. W. 786; *People ex rel. v. Newton*, 112 N. Y. 396, 19 N. E. 831, 1 N. Y. Supp. 197, 38

Am. & Eng. R. Cas. 391; *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 681; *Citizens' St. R. Co. v. Jones*, 34 Fed. 579; *Birmingham, etc., St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615; *Mayor, etc., of Allegheny v. Ohio, etc., R. Co.*, 26 Pa. St. 355; *N. Chicago City R. Co. v. Lake View*, 105 Ill. 207, 11 Am. & Eng. R. Cas. 42, 44 Am. Rep. 788.

46. *Haines v. Twenty-second St., etc., Ry. Co. (Pa. C. P.)*, 4 Am. Electl. Cas. 42, 1 Pa. Dist. 506.

it can confer upon its lessee no right to use the same and a resolution of local authority authorizing such lessee company to use "any mechanical power except steam," must be construed to mean any power which the company could legally use, and not to warrant the use of the trolley system.<sup>47</sup> Legislative authority to a street railroad company to use "such motive power as they may deem expedient and proper," does not confine the company to such methods as were known when the law was enacted, but includes the electric trolley system, though it was then unknown.<sup>48</sup> The right of a street surface railroad company to operate its cars by a power not specified in its charter can only be raised by

47. State, Lewis, Pros. v. Freeholders, 4 Am. Electl. Cas. 48, 56 N. J. L. 416, 28 Atl. 553.

The grant of an exclusive franchise to a street railroad company to operate a "city railway," providing, among other things, that steam power should not be used except with consent of the common council, and that bells should be attached to the horses, does not mean, because of the use of such words, and of the fact that horse power was the only power then in use, that the motive power should be limited to steam or horse power, or prohibit the use of electricity, so that the grant of the right to another company to use electricity would not be a violation of the franchise. *Wilmington City Ry. Co. v. Wilmington B. S. Ry. Co.* (Del. Ch.), 46 Atl. 12. And see *O'Neill v. Hestonville, etc., Ry. Co.* (Pa. C. P.), 9 Pa. Dist. 2.

48. *Paterson Ry. Co. v. Grundy*, 4 Am. Electl. Cas. 73, 51 N. J. Eq.

213, 26 Atl. 788; *H. R. T. Co. v. W. T. & R. Co.*, 135 N. Y. 393, 17 L. R. A. 674, 48 St. Rep. (N. Y.) 417, 31 Am. St. Rep. 838, 6 Am. R. & Corp. Rep. 619, 32 N. E. 148; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 46 Am. & Eng. R. Cas. 608, 48 N. W. 1007, 10 Ry. & Corp. L. J. 104; *Lockhart v. Craig St. R. Co.*, 139 Pa. St. 419, 47 Am. & Eng. R. Cas. 57, 9 Ry. & Corp. L. J. 183, 21 Atl. 26; *Bell Tel. Co. v. Montreal St. R. Co.*, Rap. Jud. Quebec, 6 B. R. 223, 10 C. S. 162; *Hooper v. Baltimore City Pass. R. Co.*, 85 Md. 509, 38 L. R. A. 509, 37 Atl. 359.

The use of steam motors by a railway company, such as are known as noiseless, although in fact not noiseless, is authorized by action on the part of the common council of a city permitting the use of noiseless steam motors, the common council knowing they were not in fact noiseless. *Farnum v. Concord H. R. Co.*, 66 N. H. 569, 29 Atl. 541.

the government with whom its contract was made, and is not subject to collateral attack in a private action to recover for injuries.<sup>49</sup> A street railroad company having the right to cross the tracks of another company by using a steam dummy engine may also cross by use of an electric trolley strung above the track when there is nothing to show that its use will entail any additional annoyance or be more dangerous than the previous method.<sup>50</sup> A street railroad company having the right to use a trolley system, although in fact using steam at the time another company, with knowledge of its rights, constructed an intersecting trolley road, need not pay the latter company any compensation for damages resulting to it from the former company's adoption of a trolley system instead of steam, thereby creating the tendency to mingle the electric currents, and create short circuits at the crossing.<sup>51</sup> Under the New York statute where the State railroad commissioners approve an application for the change of motive power stating separately various sections (the entire system consisting of several lines), as to which a change is sought, the railroad corporation must produce the consents of the owners of one-half of the property, bounded upon the particular section sought to be changed, such consents executed by attorneys in fact or by executors or by holders of

49. Chicago Gen. Ry. Co. v. Chicago City Ry. Co., 87 Ill. App. 17; affd., 57 N. E. 822.

In the case cited, it was held that, although the corporation was chartered to operate street cars by animal power, the mere fact that it actually operated them by means of an underground cable, and ran three cars at a time, at increased speed, instead of one, was not such a wrongful obstruction of the

street as to constitute a nuisance. Hine v. Bay City Consol. St. R. Co., 115 Mich. 204, 73 N. W. 116, 4 Det. Leg. N. 813.

50. Philadelphia W. C. Tp. Co. v. Philadelphia, etc., R. Co. (Pa. C. P.), 5 Pa. Dist. 305.

51. Birmingham R. & El. R. Co. v. Birmingham & T. Co., 122 Ala. 349, 25 So. 192; affd. on rehearing, 121 Ala. 475, 25 So. 777.

a naked power to sell, cannot be declared valid unless the instruments, which confer authority, are produced and examined. Without such consents it may be restrained from proceeding to make the change at the suit of an abutting owner.<sup>52</sup> The action of the board of railroad commissioners in approving or disapproving an application to change motive power upon a street railroad is in its nature judicial and reviewable by the Appellate Division of the Supreme Court.<sup>53</sup> But the board itself, having granted an application for a change of motive power, cannot subsequently reconsider or review its own action whereby the company has acquired a right in the nature of a franchise.<sup>54</sup> A statute allowing cities to permit the use of electricity on street railroads ratifies a previous consent by the city to the use of such power on the faith of which large expenditures have been incurred.<sup>55</sup>

52. St. Michael's P. E. Ch. v. Forty-second St., etc., R. Co., 26 Misc. Rep. (N. Y.) 601, 57 N. Y. Supp. 881.

Where the abutting property-owners are requested to consent to the construction and operation of a street surface railroad "to be operated by electricity or any motive power other than locomotive steam power that may be approved by the state board of railroad commissioners," the refusal of property-owners to sign such consent cannot be said to be a refusal to consent to the construction and operation of the road which the railroad company is authorized to construct and operate, and consequently it cannot afford a basis for an application by the railroad company to the appellate division for the appointment of commissioners to determine whether

the proposed road should be constructed. *Matter of Kingsbridge R. Co.*, 66 App. Div. 497.

53. *People ex rel. Babylon R. Co. v. Commissioners*, 32 App. Div. (N. Y.) 179, 52 N. Y. Supp. 908.

54. *People ex rel. Luckings v. Commissioners*, 30 App. Div. (N. Y.) 69, 51 N. Y. Supp. 71; *affd.*, 156 N. Y. 693.

55. *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114, 17 Sup. Ct. Rep. 653.

A city may by ordinance grant the right to use electric motors instead of horses for street cars without attempting to legalize the size or weight of the cars to be used or the speed at which they shall run; abutting owners cannot be said to be injured since the privileges granted are capable of

Where the legislature authorized a change to electrical power by railroad, provided the State board of railroad commissioners consented, it is to be presumed that it meant the electrical power should be applied in a way which would not contravene its established policy as to overhead wires in New York city. And the fact that a permit from the board of electrical control is not obtained does not make the act of the commissioner of public works of that city, in granting the permit to excavate streets and avenues in order to change the motive power of the railroad, illegal.<sup>56</sup>

being used without excessive or unusual injury to abutting lands. A double track for such trolley cars is not necessarily injurious or unreasonable either with respect to public convenience or to private property. *State, Roebling v. Trenton Pass. R. Co.*, 6 Am.

Electl. Cas. 137, 58 N. J. L. (29 Vroom) 669, 33 L. R. A. 129, 4 Am. & Eng. R. Cas. (N. S.) 392, 34 Atl. 1090.

56. *Potter v. Collis*, 19 App. Div. (N. Y.) 392, 46 N. Y. Supp. 471; affd. on other questions, 156 N. Y. 16, 50 N. E. 413.

**CHAPTER IV.****Regulation; Paving; Repairs.**

- SECTION I.**
1. General power of municipality to regulate.
  2. How power usually conferred and exercised.
  3. Regulation as to servants, equipments, fares, etc.
  4. Regulations as to care and manner of running cars.
  5. Regulation as to care of streets; removing dirt, snow, and ice, etc.
  6. Reports; license fees and percentages to municipality.
  7. Location of track.
  8. Construction of roadbed, track, turnouts, and switches.
  9. Remedies for unauthorized or defective construction.
  10. Construction and maintenance; how enforced.
  11. Placing electrical conductors underground.
  12. Paving and repaving.
  13. Repairs.
  14. Repair of bridges.
  15. Liability of company for neglect to repair; how enforced.
  16. Lessees' or transferees' liability.

**§ 1. General power of municipality to regulate.**—Ordinarily the common council or other legislative body of a municipality is, by statute, clothed with power to regulate the streets by ordinance, and also to provide, by ordinance, the manner in which corporations or persons shall exercise any privilege granted them in the use of the same, to prevent immoderate riding or driving therein, to regulate the running of locomotives and railroad cars therein, and by ordinance, so far as may be necessary, to provide for the good government, order, and protection of property and persons. The legislature, when it authorized the use of the public streets for street railroad purposes, was presumed to have intended that the grantee of the franchise should hold its privileges subject to such regulations as were reasonably necessary for the common use of the street for a street railroad and for ordinary

travel. Nearly all kinds of reasonable regulations can be imposed upon street railroads in the use of streets by a municipality, under the authority granted by the legislature to pass ordinances to regulate the use of the streets, and such regulations are never declared unlawful on the ground that they impair the franchises of the company. The power granted to municipal bodies to legislate by ordinance, is a grant to a subordinate body, and its legislative acts, when counter to the acts of the State legislature, must give way; but these companies nevertheless hold their franchises subject to such municipal regulations as do not unreasonably interfere with the exercise of the franchises conferred by the legislature. The franchises are exercised upon a public highway, for the public benefit, which highway is acquired and improved for the benefit and advantage of the public at large. The position is different from that of a railroad company exercising its franchises upon a roadbed of its own. The grantee in the former case is subject to municipal regulations of a greater scope in the interests of the public at large than would be justifiable in the case of the companies occupying and using their own roadbeds. Under this power, ordinances regulating the use of the streets by street railways have become frequent, especially so since the introduction of electricity as a motive power, with its capacity for a high rate of speed, as well as other dangerous and obstructive capacities. Their operation must be reasonably safe, reasonably consistent and in harmony with the legal customary use of the street by the general public; and ordinances to enforce this rule of law are reasonable in purpose and effect. Even direct legislative authority to a street railroad company to carry passengers through the streets of a city does not exempt the corporation from municipal or

police control. The principle is a general one, that when a business is authorized to be conducted by a corporation within a municipality the latter presumptively possesses the same right to regulate it that it has over like business conducted by private persons. A grant to a corporation of the right to own property and transact business confers no immunity from any police control to which a citizen could be subjected; and a reasonable regulation of the enjoyment of the franchise is not a denial of the right nor an invasion of the franchise, or a deprivation of its property, or interference with the business of the corporation. The company is presumed to know that the business of operating a city street railway must be conducted under such reasonable rules and regulations as the municipality may impose, and subject to its share of the burdens incident to the conduct of the municipal government.<sup>1</sup> The question then is, what are reasonable regulations? Now, it is within the inherent police power of a municipal corporation to regulate or restrain the use of electricity as a motive power within the corporate limits;<sup>2</sup> and any ordinance justified by the danger of such

1. State, Cape May, etc., Co., Pros. v. City of Cape May (N. J. Sup.), 6 Am. Electl. Cas. 49, 52, 53, citing Dill. Mun. Corp. (4th ed.), § 720; Trenton H. R. Co. v. City of Trenton, 53 N. J. L. 132; Consolidated T. Co. v. Elizabeth, 34 Atl. 146. And see 6 Am. Electl. Cas. 42-57, apparently different appeals concerning the same matter between the same parties, 34 Atl. 397, 58 N. J. L. (29 Vroom) 565, 3 Am. & Eng. R. Cas. (N. S.) 592; affd. in part and revd. in part in N. J. Err. & App., 60 N. J. L. 224, 37 Atl. 892, 39 L. R.

A. 609, 7 Am. & Eng. R. Cas. (N. S.) 585.

2. State, Wisconsin Tel. Co. v. Janesville St. Ry. Co., 5 Am. Electl. Cas. 289, 87 Wis. 72, 57 N. W. 970; Van Hook v. Selma, 70 Ala. 361; Mutual N. Y. Tel. Co. v. Chicago, 16 Fed. 309; D., L. & W. Co. v. East Orange, 41 N. J. L. 127; W. U. Tel. Co. v. Philadelphia (Pa. Sup.), 12 Atl. 144; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37; Sioux City St. R. Co. v. Sioux City, 138 U. S. 98, 34 L. Ed. 898.

use cannot be regarded as unreasonable. An ordinance declaring the turnouts of a street railroad company to be an unlawful obstruction, and directing the street committee to employ counsel and take lawful measures to remove them, is not unreasonable although permission had been granted by a city ordinance for the company to lay its tracks and construct all necessary turnouts. But where a single street railway turnout 1,500 feet long had been built pursuant to permission granted by the city council to build necessary turnouts and had been in use a long time, and had been made by connecting two turnouts each 500 feet long, which had been built more than two years before and maintained without objection, by constructing an intervening 500 feet of turnout so as to make one continuous turnout, an ordinance passed without notice or hearing directing its removal is unreasonable.<sup>3</sup> An ordinance requiring all passenger cars operated by electric power in any street of the city to have proper and suitable fenders to prevent accidents, and making it unlawful to operate such cars in the street without such fenders, is not unreasonable.<sup>4</sup> Where the statute authorizes the common council of the city to make such reasonable regulations and ordinances as to the rate of speed, mode of use of tracks and removal of ice and snow as the interests or

3. *Cape May v. Cape May, etc., R. Co.* (N. J. Err. & App.), 60 N. J. L. 224, 39 L. R. A. 609, 7 Am. & Eng. R. Cas. (N. S.) 585, 37 Atl. 892.

4. *State, Cape May, etc., Co., Pros. v. Cape May* (N. J. Sup.), 59 N. J. L. (30 Vroom) 396, 36 L. R. A. 653, 2 Chic. L. J. Wkly. 224, 6 Am. & Eng. R. Cas. (N. S.) 511, 36 Atl. 696. But an ordinance requiring electric cars

to be equipped with fenders extending to within "not more than three inches from the tracks" is unreasonable, since no fender can be attached immovably so that it will at all times remain at the required height above the track and all parts thereof. *City of Brooklyn v. Nassau El. Ry. Co.*, 38 App. Div. (N. Y.) 365, 56 N. Y. Supp. (90 St. Rep.) 609.

convenience of the public may require, it relates solely to the preservation of the interests and convenience of the public in the use of the streets and tracks as such, and any regulations, to be lawful, must be directed to matters connected with the construction and operation of the cars which in some manner involve and affect the streets and tracks and their use. Therefore the common council would have no authority to direct that during the winter months no car should be operated upon any street railroad of the city unless such car should have a vestibule built upon each end thereof sufficient to afford protection from the weather to motormen, conductors, and others standing upon the platforms of such cars. However reasonable such ordinance may be in itself it is to be condemned as an exercise of a power not inherent to municipal existence, an interference with the affairs of the company which the legislature has failed and apparently refused to authorize, and the assertion of a right on the part of the city which it did not, so far as appears, reserve to itself as a condition of the consent to the use of its streets by the company.<sup>5</sup> An ordinance prohibiting the use of salt on a street railroad track, except on curves at street corners, is not invalid as an impairment of the franchise of the company, or a restriction of the operation of its road, merely because

5. City of Yonkers v. Yonkers Ry. Co., 51 App. Div. (N. Y.) 271, 64 N. Y. Supp. (98 St. Rep.) 955.

An ordinance requiring a street railroad company to run its lines along narrow streets, over a narrow bridge and near to existing tracks, is unreasonable. Woonsocket St. R. Co. v. Woonsocket (R. I.), 46 Atl. 272.

Resolution of the common coun-

cil, giving consent to a street railroad company to place posts and stretch wires in a street, and prescribing the size and location of the poles and limiting the speed of the railroads when operated by electricity, is a street regulation which, under the charter of Newark, must be by ordinance. State, Halsey, Pros. v. Newark (N. J.), 4 Am. Electl. Cas. 40, 44.

it will occasion inconvenience or involve expense or prevent the company from operating its road so successfully, and evidence that the use of salt is necessary to make it possible to run street cars at a low place in which the water gathers during the day and freezes at night is not sufficient to show that the ordinance prohibiting its use is unreasonable, since it does not appear that at reasonable expense the water cannot be diverted from the tracks.<sup>6</sup> A city ordinance to correct abuses of the transfer system by compelling a passenger to use his transfer within the time limit and prohibiting him from selling it or giving it away is not unreasonable or oppressive.<sup>7</sup> The general rule is that the word "may" imposes a duty whenever it is employed in a statute to delegate a power, the exercise of which is important for the protection of public or private interests, and where the statute so authorizes a municipal board to designate the number of street railroad tracks that shall be laid in any street, lane, or avenue of the city, the court cannot set aside as unreasonable an ordinance which authorizes the laying of double tracks.<sup>8</sup> Where under authority a street railroad company has laid double tracks in many city streets, it is a reasonable regula-

6. State, Consolidated T. Co. v. Elizabeth, 58 N. J. L. (29 Vroom) 619, 32 L. R. A. 170, 3 Am. & Eng. R. Cas. (N. S.) 614, 34 Atl. 146.

7. *Ex p. Lorenzen*, 128 Cal. 431, 50 L. R. A. 55, 61 Pac. 68.

8. State, Kennelly *et al.* v. Jersey City (N. J. Sup.), 5 Am. Electl. Cas 146. In the case cited, it was held that an ordinance empowering the company to construct "any and all necessary curves, sidings, crossovers, and switches, that may be required for the proper, safe,

and economical operation of the railway" is unreasonably vague, and delegates a discretion which the municipal board itself was bound to exercise; that the statute forbade the laying of any track or tracks along any street unless the consent of the governing municipal body was first obtained, and that thereby it was to be fairly implied that the public body should know what particular tracks the company proposed to lay before it determined whether it would consent or not.

tion of the use of one of those streets to, thereafter and before the completion and operation of the road therein, provide that but a single track in that street should be used instead of the double tracks which had been first provided for.<sup>8½</sup> A street railroad company is bound by the terms of an ordinance granting its franchises, rights, and limiting the speed of its cars, and having accepted the benefits thereunder it cannot insist that any part thereof is unreasonable.<sup>9</sup> So, where it is authorized to put in a Y at a given street with the proviso that it shall, if so ordered by the common council, remove the Y within sixty days after service upon it of a copy of an order of the common council directing it to do so, it is bound by such agreement and must remove the Y when ordered. If it accept an ordinance granting the right to lay its track in the streets requiring them not to be raised above

8½. *Baltimore v. Baltimore T. & G. Co.*, 166 U. S. 673, 41 L. Ed. 1160. In the case cited, the court said: "While that ordinance provided generally for double tracks through the streets mentioned therein, the reduction of the right to use two tracks and the granting of the right to use but one for such a comparatively short distance in one particularly crowded and narrow thoroughfare was not a regulation inconsistent with the terms of the original ordinance. It would, we think, be unreasonable to hold that the least limitation of the power to operate double tracks was an infringement and impairment of the contract as set forth in the ordinance. In our opinion, the ordinance does not give any such cast-iron right or one which shall be beyond any reasonable limita-

tion and supervision by the city. It granted the use of the streets for double tracks for many miles, and the subsequent limitation of that use to one track related to but a few hundred feet where peculiar and exceptional conditions existed, where the danger to be apprehended from the use of electric cars or double tracks in a narrow and busy thoroughfare, was very great, and where it might fairly be decided by the common council that double tracks at that point would be an unreasonable and dangerous use of the street by the company and directly tend to prevent its reasonable and safe use and enjoyment by the public at large." (Pages 683, 684.)

9. *Chouquette v. Southern El. Ry. Co.*, 152 Mo. 257, 53 S. W. 897.

the surface, and to be so laid and maintained that vehicles can freely cross at any point, it must fill up the surface of the streets along the outside of the rails where it wears or wastes away, and cannot be regarded as a trespasser in so doing.<sup>10</sup> If the ordinance is conditioned that it shall keep the surface of the street inside its rails and six inches outside its tracks in good repair, then it must keep all its lines within the municipality in such repair, although it was authorized to construct and operate a part of those lines by an act imposing no such duty.<sup>11</sup> If it require the railroad company to complete its tracks within the streets and put them in operation within one year, the consent of the municipality is limited to one year unless the road is actually operated within that time.<sup>12</sup> An ordinance authorizing it to put in "such turnouts, switches, and sidetracks as may be deemed necessary," and providing that the whole length of the road shall be deemed one road, does not authorize the construction by the company of a Y switch to make a turning point for another street railroad company.<sup>13</sup> Whenever any regula-

10. Baumgartner v. Mankato, 60 Minn. 244, 62 N. W. 127.

11. Duluth v. Duluth St. Ry. Co., 60 Minn. 178, 62 N. W. 267. In the franchise of a street railroad company it was provided that the track should be laid along the north side of the highway and in such manner as to obstruct as little as possible the free passage of vehicles "along" the highway, and that that portion of the highway lying adjacent to the south rail of the track be properly dressed to the track in order that vehicles might easily cross. The highway was sixty-six feet wide and a space of about sixteen feet

in the middle thereof was used for a driveway. It was held that where the track was within the sixteen feet driveway the company must continue the grading upon its tracks, but where the track was wholly without such driveway the grading need only continue to the south rail. People v. Detroit, Y. & A. A. Ry. Co. (Mich.), 81 N. W. 336.

12. Grey v. N. Y. & P. T. Co., 56 N. J. Eq. 463, 40 Atl. 21; Atchison St. Ry. Co. v. Nave, 38 Kan. 744, 17 Pac. 587.

13. Rapid R. Co. v. Mt. Clemens, 118 Mich. 133, 76 N. W. 318, 5 Det. Leg. N. 475.

tion has been made, with authority, as to the existing road, the same regulation will be applicable to any extension of the same road within the city limits.<sup>14</sup> If the rights of the railroad company are acquired subject to a constitutional provision that all its privileges and franchises shall be subject to legislative control, and that there shall be no irrevocable or uncontrollable grant of special privileges or immunities, an enlargement of the liability of the company for paving a street is not unconstitutional.<sup>15</sup> In Ohio it has been held that power is not conferred upon cities by the Ohio Revised Statutes, § 3438, to authorize street railroad companies to extend their tracks over State or county roads under the supervision of the county commissioners without condemnation or an agreement with the commissioners, but only to grant such right subject to the obligation of making such agreement or instituting such proceedings.<sup>16</sup> In New York, where the General Railroad Act gives street railroad companies the power to construct necessary sidings or turnouts, provided it obtain authority therefor from the city authorities, a street railroad company has no right to maintain a siding on Ninth avenue in the city of Brooklyn unless it has first obtained the consent of the common council, although another statute granted to the department of parks in the city of Brooklyn full and exclusive power to determine the particular location of any railroad track which was then or might thereafter be placed upon the roads, streets, or avenues forming the boundary of the park (of

14. *St. Louis v. Missouri R. Co.*, 13 Mo. App. 524.

15. *Storrie v. Houston St. R. Co.*, 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716; *Cleveland v. Cleve-*

land El. Ry. Co. (C. P.), 3 Ohio Dec. 92, 1 Ohio N. P. 413.

16. *Citizens' El. R., L. & P. Co. v. County Comrs.*, 56 Ohio St. 1, 37 Ohio L. J. 165, 46 N. E. 60.

which avenues Ninth avenue was one).<sup>17</sup> A court of equity cannot interfere with the manner in which an electric railroad shall be constructed upon a public highway over which a municipality, like a county, has control.<sup>18</sup>

**§ 2. How power usually conferred and exercised.**—The legislature either expressly authorizes municipalities to enact regulations to control the operation of street railroads upon the streets of a city as to certain specific matters, or it subjects the operation thereof to such reasonable rules and regulations in respect thereto as the common council of the city may from time to time prescribe. Sometimes the statutes of a State direct what regulations shall be made in specific instances and also authorizes the making of reasonable rules and regulations to otherwise control such operation in the discretion of the common council. An ordinance within the power so expressly granted to control specific instances cannot be declared void or unreasonable by the courts where the act conferring the power does not violate any constitutional inhibition.<sup>19</sup> If the power exists courts can only con-

17. *Irvine v. Atlantic Ave. R. Co.*, 10 App. Div. (N. Y.) 560, 42 N. Y. Supp. 1103.

18. *Ranken v. St. Louis & B. Sub. Ry. Co.*, 98 Fed. 479.

19. *Mayor v. D. D., E. B. & B. R. Co.*, 133 N. Y. 104, 44 St. Rep. (N. Y.) 94, 30 N. E. 563; *Haines v. Cape May*, 50 N. J. L. 55

New York has the following statutory provision:

"**§ 98. Repair of streets; rate of speed; removal of ice and snow.**—Every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or

public place in any city or village shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of thirty days notice to do so, the local authorities may make the same at the expense of such corporation, and such authori-

strue the extent thereof and have nothing to do with the unreasonableness of the ordinance or the injustice of carrying it into effect. It must always be remembered that the common council of any municipality can exercise only such powers as have been specially delegated to it by the legislature; and such other powers as may be necessary to carry into effect any and all the powers vested in the municipal corporation. Where the court can inquire into the reasonableness of an ordinance a question of law is presented for the court to decide upon a consideration of all the facts and circumstances of the case. The presumption is always in favor of the reasonableness of the ordinance, and the burden is upon the person or corporation alleging the contrary to show it. The common council acts as a public or municipal agent and exercises an authority which was delegated to it by the legislature as being the proper and representative body to make rules and regulations to which the railroad company should be subject. In the passage of a general ordinance affecting subjects of municipal administration it should and will be presumed that the common council acted in the exercise of a judgment upon facts and for reasons calling for such legislative action.<sup>20</sup> The power to regulate or to make regula-

ties may make such reasonable regulations and ordinances as to the rate of speed, mode of use of tracks, and removal of ice and snow, as the interests or convenience of the public may require. A corporation whose agents or servants willfully or negligently violate such an ordinance or regulation, shall be liable to such city or village for a penalty not exceeding five hundred dollars to be specified in such ordinance or

regulation." (Railroad Law, as amended by chap. 676 of 1892; 3 Heydecker's Gen. Laws [2d ed.], 3316, § 98.)

20. Mayor v. D. D., E. B. & B. R. Co., 133 N. Y. 104, 111, 44 St. Rep. (N. Y.) 94, 30 N. E. 563. In the case cited, the court also said: "Presumptively, the ordinance was required in the interests of the public, for whose convenience railroad companies hold and must operate their franchises, but the

tions is a broad one. The word "regulate" is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and inter-State commerce, and he who reads the many opinions of the United States Supreme Court will perceive how broad and comprehensive it has been held to be. Where the city gives a right to the use of its streets it simply regulates that use when it prescribes the terms and conditions upon which they shall be used. This power of regulation is a continuing power and is not exhausted by being once exercised, and so long as the object is plainly one of regulation the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to

presumption is open to rebuttal by this defendant by giving in evidence facts which show that, in its case, its enforcement would be unreasonable, and that the convenience of the public, or of passengers, did not require such a regulation" (the regulation required street surface railroads to run not less than one car every twenty minutes, between the hours of 12 midnight and 6 o'clock, A. M., each and every day, both ways, for the transportation of passengers). "It was, therefore, competent for this defendant upon the trial to give evidence of such facts as would establish, or tend to establish, that the convenience of passengers, or of the public, did not require the running of its cars during the ordinance hours specified. Such facts were plainly relevant to the issue and bore upon the question of the reasonableness of the ordinance in the defendant's

case. Undoubtedly the reasonableness of the ordinance was a question of law for the court to decide upon a consideration of all the facts and circumstances of the case. It is the province of courts to construe the acts of legislative bodies, and within that jurisdiction, in a proper case, to apply and to enforce their provisions. When the law is positive and plain in its terms and requirements, and if it does not conflict with any constitutional rights or immunities, then that strict compliance must be enforced which a fair reading demands, and construction may have little or no work to perform.

"But, if limitations are affixed to the law which control in its application to subjects, it is for the court to decide whether, under the circumstances as disclosed, the conditions for its application are met by the case."

one condition to-day and to another and additional one to-morrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation and is not imposed arbitrarily or capriciously.<sup>21</sup> The power is usually exercised by the passage of an ordinance in the usual way and without notice or hearing granted to the railroad company. The direction to the railroad company should be specific and point out what the municipality requires to be done and when it should be done. Under an ordinance requiring the company to cause the grade of its roadbed and tracks to conform to the "then" and "thereafter" established grades of the streets over which its tracks extended, and at all points where its road crosses any street to grade the street upon which the track is laid for the full width, the company is not bound to grade its roadbed to the street until the city directs the grading to be done.<sup>22</sup> Where a franchise is conferred which, as a condition, requires the grantee to acquire the franchise of a former company con-

21. *Baltimore v. Baltimore T. & G. Co.*, 166 U. S. 673, 685, 41 L. Ed. 1160, 1164, citing *St. Louis v. W. U. T. Co.*, 149 U. S. 465, 37 L. Ed. 810; *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650-672, 29 L. Ed. 516-524; *N. Y. & N. E. R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. Ed. 269, 273. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of

good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*, and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boston Beer Co. v. Massachusetts*, 97 U. S. (7 Otto) 25, 24 L. Ed. 989, 992.

22. *Kitchell v. Manchester, etc., Co.*, 79 Mo. App. 340, 2 Mo. App. Rep. 457.

taining regulations as to the manner of operating the cars, and the later franchise does not refer to such old requirements or make the provisions of the old grant part of the new one, the new franchise is not subject to the old conditions and regulations.<sup>23</sup> An ordinance requiring street railroad companies to furnish and maintain at their own expense all necessary conduits and siphons for carrying surface water across and under the streets on which their tracks are laid, does not include the duty of keeping such siphons in a sanitary condition, if their unsanitary condition does not impede the flow of water through the culverts.<sup>24</sup> Although the common council of a municipality has general authority to make regulations controlling the operation of street railroads, the provision of the charter of a street railroad company or a general statute may provide for a permission or consent to a particular construction from some other department of the municipal government. In New Jersey such company cannot rebuild or reconstruct its road in a city street without obtaining consent of the board of public works, which, by the charter granted to the company, is given power to prescribe the manner in which corporations or persons shall exercise any privilege granted in the use of any street or in the digging up of any street and to prohibit and prevent any such use or work at such times and seasons

23. Stafford v. Chippewa Val. El. R. Co. (Wis.), 85 N. W. 1036.

24. Denver v. Denver City Cable R. Co., 22 Colo. 565, 45 Pac. 439.

The case cited also held, that the city could not, by virtue of its police power, require a street railroad company to keep siphons in the streets over which its tracks run, in a sanitary condition, where

the only reservation in the ordinance by which the right to operate the road was granted is to pass any ordinances with reference to the operation of the railroad necessary to the public health and safety and reserving the police and legislative powers and functions with respect to the streets and avenues that may be used and occupied by the railroad.

of the year as it may designate.<sup>25</sup> A municipal corporation must exercise the power conferred upon it in the manner especially prescribed by statute. If no particular method for the exercise of the power is specified, the city authorities may act by resolution, or in any other appropriate manner, and such action would be as effectual as if an ordinance for the same purpose were enacted.<sup>26</sup>

**§ 3. Regulation as to servants, equipments, fares, etc.—**A municipal corporation, empowered by its charter to regulate its streets and to prescribe the manner of their use by any person or corporation, has exclusive power to determine, in the first instance, how the space within the bounds of the highway shall be appropriated to the various uses of the highway.<sup>27</sup> And, within its police power, unless limited by statute or contract with the company, it may determine and direct, within reasonable bounds, as to the servants and appliances to be employed in operating cars upon a street surface railroad within the highway. It may enact that electric railroad cars should not be run without a conductor.<sup>28</sup>

25. Trenton v. Trenton Pass. Ry. Co. (N. J. Ch.), 27 Atl. 483.

26. Lincoln St. Ry. Co. v. City of Lincoln (Nebr.), 84 N. W. 802.

27. Budd v. Camden H. R. Co. (N. J. Ch.), 48 Atl. 1028.

28. State, Columbia El. St. Ry., etc., Co. v. Sloane (S. C. Sup. Ct.), 6 Am. Electl. Cas. 57. In the case cited the court said: "Not only is there an absence of legislative intent to prevent the authorities of the city of Columbia from reserving its powers of police in regard to the street railways, but the trend of the various legislative enactments relative thereto, and

hereinbefore mentioned, is to make the running of the street cars subject to rules and regulations prescribed by the city council. This police power of the city seems to have been recognized by the petitioner when it filed its petition with the city council asking permission to be allowed to make such changes in its line as were necessary to enable it to operate its cars by electricity, and with such petition presented the draft of an ordinance to accomplish that result, in which it was provided that the city council should have the power 'and hereby reserves the right to

But it cannot require a railroad company to take up the rails, long used in the streets with municipal consent, and substitute others which the municipal authorities determine are more suited to the convenience and safety of the traveling public. It may however prohibit the use of a certain kind of rail in all future construction, and provide for such future construction, the kind of rails to be used, and the manner of making the roadbed, etc., provided however that its requirements are not unnecessarily burdensome, and do not impair vested rights or contract obligations, or unnecessarily interfere with and obstruct public travel and the use therein of the latest approved methods and appliances of passenger carriers.<sup>29</sup> It may be stated generally, that rates of fare upon street surface railroads are regulated by statute in the several States. It is generally provided that a rate not exceeding a stated fee shall be charged for one continuous passage over the lines of a street surface railroad company within a municipality, including all its branches, extensions, and leased lines,

regulate, by ordinance, the manner of operating such electric railway, and to alter and amend the ordinances relating thereto by such other enactment as in their judgment the public welfare may demand.' The authorities are not in harmony touching the abstract question whether municipal authorities have the right to make a regulation that the street cars shall not be operated unless in charge of a conductor."

No statute or ordinance otherwise requiring a horse car in a city may be run without a conductor. Dunn v. Cass Ave., etc., R. Co., 21 Mo. App. 188.

29. Toronto v. Toronto St. Ry. Co., 15 Ont. App. 30; Brooklyn Crosstown R. Co. v. Brooklyn, 37 Hun (N. Y.), 14; Ganiard v. Rochester City, etc., Co., 50 Hun (N. Y.), 22; Lanline v. Houston, etc., Co., 14 Daly (N. Y.), 144; Bishop v. Union R. Co., 14 R. I. 214; Trenton H. R. Co. v. Trenton, 53 N. J. L. (24 Vroom) 132, 11 L. R. A. 410, 32 Am. & Eng. Corp. Cas. 445, 20 Atl. 1076; El. R. Co. v. Grand Rapids, 84 Mich. 257, 47 N. W. 567; Easton, etc., Ry. Co. v. Easton, 133 Pa. St. 505; Waterloo v. Waterloo St. Ry. Co., 71 Iowa, 193; Harrisburgh City Pass. Ry. Co. v. Harrisburgh, 7 Pa. Co. Ct. 587.

and including lines of other roads with which traffic arrangements have been made. Although by its charter a railroad corporation is given power to fix rates, such power is subject to change unless clearly stipulated to the contrary. But neither the legislature nor any commission acting under the authority of the legislature can establish, arbitrarily and without regard to justice and right, a tariff of rates for fares and transportation which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation, on the other. The question of the reasonableness of the rate is always a judicial one.<sup>30</sup> It should be remembered however that the legislature

30. Chicago, M. & St. P. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970; Minneapolis Eastern R. Co. v. Minnesota, 134 U. S. 467, 469, 482, 33 L. Ed. 985, 987, 991, 10 Sup. Ct. Rep. 473, 477; Griffin v. Goldsboro Water Co., 122 N. C. 210, 30 S. E. 320, 41 L. R. A. 242; Atty.-Gen. v. Old Colony R., 160 Mass. 87, 35 N. E. 256, 22 L. R. A. 118; State v. Edwards, 86 Me. 106, 41 Am. St. Rep. 531, 29 Atl. 948, 25 L. R. A. 506; Wellman v. Chicago, etc., Ry. Co., 83 Mich. 611; affd., 143 U. S. 344, 36 L. Ed. 179, 12 Sup. Ct. Rep. 402, 47 N. W. 494; R. R. Comrs. v. Grocer Co., 53 Kan. 212, 35 Pac. 219; St. Louis, etc., Ry. v. Gill, 156 U. S. 658, 39 L. Ed. 570, 15 Sup. Ct. Rep. 488; Covington, etc., Co. v. Sandford, 164 U. S. 592, 41 L. Ed. 565, 17 Sup. Ct. Rep. 204; Smyth v. Ames, 169 U. S. 523, 42 L. Ed. 841, 18 Sup. Ct.

Rep. 425 (restraining enforcement of Nebraska Act of 1893); Inter-State Commerce Commission v. Baltimore, etc., Ry., 43 Fed. 42 (refusing to enjoin sale of party-rate tickets); Mercantile Trust Co. v. Texas & Pacific Ry., 51 Fed. 533, 540, 542 (restraining enforcement of Texas Railroad Commission Act of 1891); Atlantic, etc., R. v. United States, 76 Fed. 192 (holding government did not limit its right to fix reasonable rates); State v. Kansas Central R., 48 Kan. 506, 28 Pac. 211 (holding commissions recommended for railroad repaiis, etc., not conclusive on court); State v. Sioux City, etc., R., 46 Nebr. 693, 65 N. W. 769, 31 L. R. A. 52 (holding statute arbitrarily fixing the same price for long and short haul between same points invalid); B. E. S. R. Co. v. B. S. R. Co., 111 N. Y. 132, 19 N. E.

has the power to fix the rates, and the extent of judicial interference is protection against unreasonable rates.<sup>31</sup> The legislature may delegate to the municipal authorities the power, within reasonable limits, to fix the rates of fare and to adopt and enforce ordinances on matters of special local improvement, although general statutes exist upon the same subjects.<sup>32</sup> And when the power is so delegated the city

63. In the case last cited the court said: "The same authority which confers upon one body the power of legislation, authorizes its successors, in the exercise of their duty, to change, alter and annul existing laws when, in their judgment, the public interest requires it. In the performance of their duty of legislating for the public welfare, each successive body must, from necessity, be left untrammeled except by the restraints of the fundamental law and when called upon to act upon subjects which concern the health, morals or interests of the people, as affected by a public use of property for which compensation is exacted by its owners, they are unlimited by constitutional restraint."

Railroad corporations hold their property and exercise their functions for the public benefit, and they are, therefore, subject to legislative control. The legislature, which has created them, may regulate the mode in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, etc. \* \* \* It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads or

passing upon highways crossed by railroads. All this is within the judgment of legislative power, although the power to alter and amend the charter of such corporation has not been reserved. \* \* \* Such legislation violates no contract, takes away no property, and interferes with no vested right. *People v. Boston & Albany R. Co.*, 70 N. Y. 569; *McInerney v. Denver*, 17 Colo. 302, 37 Am. & Eng. Corp. Cas. 424, 29 Pac. 516.

31. *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. Ed. 176; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 29 L. Ed. 636; *Railway Co. v. Ryan*, 56 Ark. 248, 19 S. W. 839; *Clyde v. Richmond*, etc., R. Co., 57 Fed. 439 (entertaining bill for relief against action of commissioners); *Indianapolis v. Navin*, 151 Ind. 144, 47 N. E. 526, 41 L. R. A. 340, sustaining ordinance for three-cent fares.

32. *Indianapolis v. Navin*, 151 Ind. 144, 47 N. E. 526, 41 L. R. A. 340. Under the constitutional laws of Louisiana, New Orleans is clothed with full and exclusive power to grant franchises for the construction and operation of passenger street railways within its corporate limits, including the right to regulate the rates of fare

cannot, by resolution or otherwise, abrogate its power with reference to the grantee of any particular franchise.<sup>33</sup> In New York the matter is controlled by sections 101 and 104 of the Railroad Law.<sup>34</sup> The New York Railroad Law cited confers on a passenger who has taken passage on a leased road the right to a continuous trip, for a single fare, not only along the line of the leased road, but also along other lines which

to be exacted. *Forman v. New Orleans & C. R. Co.*, 40 La. Ann. 446, 4 So. 246. And see *Baltimore & Y. Tp. Rd. v. Boon*, 45 Md. 344; *Ellis v. Milwaukee City Ry. Co.*, 67 Wis. 186, 30 N. W. 218.

33. *Milhau v. Sharp*, 17 Barb. (N. Y.) 435.

34. Chap. 565 of 1890, § 101, as amended by chap. 676 of 1892 and chap. 688 of 1897, § 1; and § 104, as amended by chap. 676 of 1892. See 3 Heydecker's Gen. Laws (2d ed.), 3318, 3320. The provisions are as follows:

"§ 101. **Rate of fare.**—No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. Not more than one fare shall be charged within the limits of any such city or village, for passage over the main line of road and any branch or extension thereof if the right to construct

such branch or extension shall have been acquired under the provisions of such chapter or of this article; except that in any city of the third class, or incorporated village, it shall be lawful for such corporation to charge and collect as a maximum rate of fare for each passenger, ten cents, where such passenger is carried in a car which overcomes an elevation of at least four hundred and fifty feet within a distance of one and a half miles. This section shall not apply to any part of any road constructed prior to May six, eighteen hundred and eighty-four, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, or shall acquire such right under the provisions of this article, in which event its rate of fare shall not exceed its authorized rate prior to such extension. The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article."

For § 104 of the statute see note 5 to § 9 ante.

were under control of, or operated by the lessee at the time the lease was executed; but such right does not extend to roads subsequently built or acquired by the lessee.<sup>35</sup> Neither of the sections cited have reference to a steam railroad constructed prior to the passage of the Act of 1884, although such steam railroad is converted into a trolley road and its tracks joined to those of a street surface road and all are within the limits of the same municipality and operated as one continuous road. A full, separate fare may be charged on each branch of the road for a continuous trip over both branches.<sup>36</sup> The word "fare" as used in section 101 of the New York Railroad Law cited below, does not indicate that the carriage of passengers alone is within the contemplation of the act.<sup>37</sup> A common carrier operating a street railroad is bound by a representation made by one of its conductors to a passenger that its car will carry him between two points for a fare named.<sup>38</sup> A franchise to a street railroad company by a township, providing for the sale of trip tickets on cars of the company at a reduced rate between a village in the township and a city without the township, requires such tickets to be sold on cars at any point on the line, and does not limit such sale to the line within the township granting the fran-

35. *Mendoza v. Met. St. R. Co.*, 51 App. Div. (N. Y.) 430, 64 N. Y. Supp. (98 St. Rep.) 745; *McNulty v. Brooklyn Heights R. Co.*, 31 Misc. Rep. (N. Y.) 674, 66 N. Y. Supp. (100 St. Rep.) 57.

36. *Barnett v. Brooklyn Heights R. Co.*, 53 App. Div. (N. Y.) 432, 65 N. Y. Supp. (99 St. Rep.) 1068. And see *Brooklyn Elev. R. Co. v. Brooklyn, etc., R. Co.*, 23 App. Div. (N. Y.) 29, 48 N. Y. Supp. (82 St. Rep.) 665; *Roosa v.*

*Brooklyn Heights R. Co.*, 28 Misc. Rep. (N. Y.) 387, 59 N. Y. Supp. (93 St. Rep.) 664; *McNulta v. Brooklyn Heights R. Co.*, 36 Misc. Rep. (N. Y.) 403.

37. *De Graw v. Long Island El. R. Co.*, 43 App. Div. (N. Y.) 502, 60 N. Y. Supp. (94 St. Rep.) 163.

38. *Wright v. Glens Falls, etc., St. R. Co.*, 24 App. Div. (N. Y.) 617, 48 N. Y. Supp. (82 St. Rep.) 1026.

chise.<sup>39</sup> An individual cannot maintain an action to restrain a street railroad company from charging fare at a rate in excess of that permitted by law; but the remedy is by a proceeding with the attorney-general to vacate its charter.<sup>40</sup> The power to make a regulation controlling the operation of a street railroad includes the power to enforce it by fine,<sup>41</sup> and by imprisonment.<sup>42</sup>

**§ 4. Regulations as to care and manner of running cars.—** Municipal authorities have the right and duty, by legislation, to regulate the rate of speed for the operation of street cars upon the streets within the corporate limits; and the right and duty exists by virtue of the police power which the authorities have and should exercise for the protection of individuals and their property when legally using the streets. An ordinance limiting the speed of street cars must be

39. Rice v. Detroit, Y. & A. R. Ry. (Mich.), 81 N. W. 927, 48 L. R. A. 84. In the case cited it was held that, the franchise requiring the sale of five tickets for fifty cents, where the tickets are sold in two parts, one of which is good to a main point on the line and the other part good for the remainder of the trip, the railroad company will not be heard to say in an action for damages for refusal to sell five tickets to one who had paid his fare on the first part of the line with a stub, intending to pay for the remainder of the trip with a stub from the new tickets, that the franchise called only for the acceptance of a through ticket for the payment of fare, and hence plaintiff cannot recover for defendant's failure to furnish a ticket in two

parts not called for by the franchise.

40. McNulty v. Brooklyn Heights R. Co., 31 Misc. Rep. (N. Y.) 674, 66 N. Y. Supp. (100 St. Rep.) 57.

41. Detroit v. Fort Wayne & B. I. R. Co., 95 Mich. 456, 20 L. R. A. 79, 54 N. W. 958.

42. *Ex parte* Greene, 94 Cal. 387, 29 Pac. 783; Eureka Springs v. O'Neil, 56 Ark. 350, 19 S. W. 969. A city ordinance which does not contain any penalty for its violation, as required by the city charter, is nugatory and cannot be amended by requiring a party to deposit a sum of money as security that he will not do an act prohibited thereby. *Ex parte* O'Keefe, 46 St. Rep. (N. Y.) 557, 19 N. Y. Supp. 676.

reasonable and certain, and although passed before electric cars were in vogue, if it generally limit the speed at which street cars may be drawn in the streets of the city, to, say, six miles an hour, it will apply to electric cars when they are used upon the streets.<sup>43</sup> An ordinance may be enacted com-

43. *Lewis v. Cincinnati St. Ry. Co.*, 10 Ohio S. & C. P. Dec. 53; *Martineau v. Rochester Ry. Co.*, 81 Hun (N. Y.) 263, 62 St. Rep. (N. Y.) 722, 30 N. Y. Supp. 778; *State v. City of Cape May et al.*, 6 Am. Electl. Cas. 42, 36 L. R. A. 656, 59 N. J. L. (30 Vroom) 393, 9 Am. & Eng. R. Cas. (N. S.) 507, 36 Atl. 679; *Railroad Co. v. City of Cape May et al.*, 6 Am. Electl. Cas. 45. An ordinance of the city of New York, passed in 1890, required a street surface railroad company to run a passenger car each way every twenty minutes of every day between midnight and 6 o'clock in the morning. The ordinance was continued by sections 595 and 596 of the Revised Ordinances, approved March 30, 1897. *Held*, a consolidated street surface railroad company, incorporated in 1892, is subject to the penalty imposed by said sections for a failure or neglect in this respect. A city ordinance, imposing a duty on railroad companies "now" running cars in the streets, subsequently re-enacted in the same language, is continuous and the duty in question is imposed upon a street railroad corporation incorporated between the time of the enactment of the original ordinance and its re-enactment. *City of New York v. Union R. Co.*, 31 Misc. Rep. (N. Y.) 451, 64 St.

Rep. (N. Y.) 483. In the case cited, it was also held that, under an ordinance requiring cars to be run over the entire tracks of the road at intervals of twenty minutes, the company could not escape liability by proof that the failure or neglect to do so was upon only a portion of its line.

But where an ordinance fixes eight miles an hour as the maximum speed for street cars, and also requires street railroad companies to operate their cars according to the provisions of their charter, a company whose franchise provides that its cars may be run at a speed greater than eight miles an hour is entitled to so run them, since a franchise must be considered a part of the charter. *Ruschenberg v. So. El. R. Co. (Mo.)*, 61 S. W. 626. The ordinance of the city of New York, requiring all railroads operating lines of cars in the streets to run cars during certain hours at intervals of not less than twenty minutes, is valid and binding upon the defendant by force of the terms of its charter. *Mayor v. N. Y. & H. R. Co.*, 10 Misc. Rep. (N. Y.) 417, 63 St. Rep. (N. Y.) 530; *sub nom. City of New York v. N. Y. & H. R. Co.*, 31 N. Y. Supp. 147.

The charter of a street railroad compelled it to run its cars "as often as the convenience of pas-

pelling passenger cars operated by trolley or other power to come to a full stop before crossing intersecting streets; and such an ordinance, if enacted in the manner prescribed by the charter of the city, is legislative in its character and will not be set aside as unreasonable in its purpose or effect.<sup>44</sup> A street railroad company is not given the right to run its cars at any desired rate of speed, by a charter giving it the paramount right of way upon city streets, but must regulate the speed so that the cars may be quickly stopped should it be required to avoid an accident.<sup>45</sup> An ordinance granting a franchise may provide that motormen and conductors shall keep a vigilant watch for persons on or moving toward its tracks, and on the first appearance of danger to such person that the car shall be stopped in the shortest time and space possible. But the acceptance of such a franchise is not shown by an

sengers may require and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the city of New York may from time to time by ordinance prescribe;" it was held that, while the reasonableness of the ordinance was a question of law, the defendant might show that the convenience of passengers did not require that cars should be run during certain hours specified by the ordinance, and that the fact that the evidence related to a time subsequent to the date when the ordinance took effect was not a ground of objection. *Mayor v. D. D., E. B. & B. R. Co.*, 133 N. Y. 104, 30 N. E. 563, 44 St. Rep. (N. Y.) 94, revg. 39 id. 105, 15 N. Y. Supp. 297. Such an ordinance is valid as against a company, the char-

ter of which provides that the line is to be constructed only with the consent of the municipal authorities, who are thereby authorized to regulate the time and manner of using the same. *New York v. N. Y. & H. R. Co.*, 10 Misc. Rep. (N. Y.) 417, 31 N. Y. Supp. 147, 63 St. Rep. (N. Y.) 530.

44. *Railroad Co. v. City of Cape May*, 6 Am. Electl. Cas. 45. An ordinance showing the rate of speed cars are allowed to run is competent evidence in an action for negligence. *Hall v. Ogden City Ry. Co.* (Utah), 6 Am. Electl. Cas. 598. And see *Donnaher v. State* (Miss.), 8 Smedes & M. 649; *Trenton H. R. Co. v. Trenton*, 53 N. J. L. 132, 11 L. R. A. 410.

45. *Gosnell v. Toronto R. Co.*, 21 Ont. App. 553.

agreement of the company to hold the city harmless from all damages that may accrue to it by reason of its failure to comply with the ordinances, as the city cannot be held in damages for any failure of the company to keep such an ordinance.<sup>46</sup> The municipal authorities may, by way of regulation, after a franchise, silent upon the subject, is accepted and by virtue of their police power, require that motormen and conductors shall keep vigilant watch for persons on or moving toward its tracks, and on the first appearance of danger to such person that the car shall be stopped in the shortest time and space possible, unless such an ordinance were too indefinite to be reasonable. The reasonableness of the rule of a street railroad corporation that passengers shall not stand on the rear platform, like a regulation by a municipality as to the operation of street cars, is to be judicially determined by the court.<sup>47</sup> A street railroad company cannot stop its cars for any length of time to bring the price or conditions of labor necessary to run the same down to the conditions offered by it. If the necessary labor to perform its public obligations to run its cars and to carry passengers cannot be obtained at the price or on the conditions it offers, it must offer such prices and conditions as will obtain it without regard to the effect upon its dividends.<sup>48</sup> A horse railroad company chartered by the legislature may, while legally operating its road, restrain a rival coach company,

46. *Murphy v. Lindell R. Co.*, 153 Mo. 252, 54 S. W. 442. And see *Fath v. Tower Grove, etc., Ry. Co.*, 105 Mo. 537, 13 L. R. A. 74, 16 S. W. 913; *Liddy v. St. Louis R. Co.*, 40 Mo. 506. Such an ordinance is applicable to cable railways. *Lamb v. St. Louis Cable & West. Ry. Co.*, 33 Mo. App. 489.

47. *Montgomery v. Buffalo R. Co.*, 24 App. Div. (N. Y.) 454, 48 N. Y. Supp. (82 St. Rep.) 849.

48. *Re Loader v. The Brooklyn Heights R. Co.*, 14 Misc. Rep. (N. Y.) 208, 35 N. Y. Supp. 996, 70 St. Rep. (N. Y.) 571.

organized under the New Jersey General Corporation Act and licensed by the city where the tracks are laid, from regularly using its tracks, with coaches adapted thereto, in competition with it in its business of transporting passengers and goods for hire, and from obstructing it in the use of such tracks by impeding such use by stopping thereon to take on and let down passengers.<sup>49</sup> When a statute is obviously intended to provide for the safety and health of a community and of travelers and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful and must be sustained.<sup>50</sup> Accordingly, a municipal regulation may prohibit smoking in street cars;<sup>51</sup> the use of salt or sand upon tracks;<sup>52</sup> it may compel the removal of ice and snow; it may provide that cars driven in the same direction should not approach each other within a distance of 300 feet, except in case of accident and at stations;<sup>53</sup> it may provide as a proper police regulation that passenger cars be licensed on payment of a stipulated fee;<sup>54</sup> and a statute directing companies to furnish tickets and checks to all passengers who apply for them, does not contravene any charter right.<sup>55</sup>

49. Camden H. R. Co. v. Citizens' Coach Co., 31 N. J. Eq. 525.

50. City of Rochester v. West, 164 N. Y. 510, 514; Village of Carthage v. Frederick, 122 id. 268,

25 N. E. 480; People *ex rel.* O. H. C. Assn. v. Pratt, 129 N. Y. 68, 29

N. E. 7; Mayor, etc. v. D. D., E. B. & B. R. Co., 133 N. Y. 104,

30 N. E. 563; City of Rochester v. Simpson, 134 N. Y. 414, 31 N. E. 871; People v. Havnor, 149 N. Y.

195, 204, 43 N. E. 541.

51. Louisiana v. Heydenhain, 42

La. Ann. 483, 7 So. 621. See also Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989, 992; Fertilizer Co. v. Hyde Park, 97 U. S. 659.

52. D. D., E. B. & B. R. Co. v. Mayor, 47 Hun (N. Y.), 221.

53. Bishop v. Union R. Co., 13 R. I. 314.

54. Frankford & Philadelphia Pass. Ry. Co. v. Philadelphia, 58 Pa. St. 119.

55. California 1882 Rev. Stat., § 502.

**§ 5. Regulation as to care of streets; removing dirt, snow, and ice, etc.**—The duty is imposed upon each municipality to remove obstructions from the streets and to keep the streets in a condition for travel; and in the performance of this duty it has the right to regulate the use made by street railroad companies of snow-plows which pile up the snow upon both sides of the tracks and prevent the use, either by the abutting owners or by the general public, of any other part of the street for the purpose of passage or access to their own premises. A street surface railroad company has no right to control or use or in any manner interfere with any part of the public streets, except that actually included within its roadway; and if there be a necessity of removing snow from the tracks, the obligation is imposed upon the company, not only to remove it from its tracks, but not to put it upon other parts of the streets where it becomes an obstruction to the use of the street by other passers-by.<sup>56</sup> In the case of an extraordinary storm the company must make extraordinary efforts.<sup>57</sup> In removing snow and ice from its tracks it must

56. Broadway Ry. Co. v. Mayor, 49 Hun (N. Y.), 126, 131; Ovington v. Lowell & S. St. R. Co., 163 Mass. 440, 40 N. E. 767; Markowitz v. Dry Dock, E. B. & B. R. Co. (C. P.), 12 Misc. Rep. (N. Y.) 412, 67 St. Rep. (N. Y.) 572, 33 N. Y. Supp. 702. While a railroad company has the right to remove the snow from its tracks, it cannot lawfully cause an obstruction which would interfere with the safe passing and repassing of persons traveling upon the street. Dixon v. Brooklyn City & Newtown R. Co., 100 N. Y. 170, 176.

57. Bowen v. Detroit City R. Co., 54 Mich. 496, 52 Am. Rep. 822. A

street railroad company is not chargeable with negligence in heaping up snow along the sides of its track after a heavy snowstorm, rendering it liable to one injured by the overturning of a sleigh, in the absence of evidence that such heaping up was unnecessary; or that the work could have been done in some other manner, or that the heaps were not removed within a reasonable time. Ovington v. Lowell & S. St. R. Co., 163 Mass. 440, 40 N. E. 767; Union Ry. Co. v. Mayor, 11 Allen (Mass.), 287; Newport News & O. P. Ry., etc., Co. v. Bradford (Va.), 37 S. E. 807. A street railroad company which

be careful not to interfere with the natural flow of water from the street, either by obstructing the gutter or otherwise; but in the absence of municipal regulation requiring it, it is not obliged to haul the snow away, and is only liable in case it has failed to exercise ordinary care.<sup>58</sup> Where a street car company has obstructed that portion of the streets outside of its tracks by snow pushed from that part of the street upon which its tracks are laid, and has then obstructed one of its tracks with a repair-wagon, so that there remains only the other track upon which a citizen may drive, a driver injured by collision with the car in attempting to pass such repair-wagon with his team, can recover against the company.<sup>59</sup> Under a statute providing that "any person or corporation, except municipal corporations, through whose negligence or carelessness any obstruction or want of repair in a highway is caused, shall be liable to any person injured by reason thereof," such a company is liable for damages caused by a dangerous bank of snow left on the side of its tracks after cleaning them, where it had a reasonable time within which to remove it.<sup>60</sup> Under exceptional circumstances, courts of equity have interfered and prevented, by injunction, at the instance of the abutting owner, such accumulations of snow and ice between the railroad tracks and abutting property, access to which was by that means materially impaired, after

allows a snowbank erected by it to remain an unreasonable length of time is liable as for the maintenance of a public nuisance, although the duty to remove the snow also devolved upon others. *Markowitz v. Dry Dock, etc., Co.*, 12 Misc. Rep. (N. Y.) 412, 67 St. Rep. (N. Y.) 572, 33 N. Y. Supp. 702.

<sup>58.</sup> *Short v. Baltimore City Pass. Ry. Co.*, 50 Md. 73; *Wallace v.*

*Detroit City R. Co.*, 58 Mich. 231.

<sup>59.</sup> *West Chicago St. R. Co. v. O'Conner*, 85 Ill. App. 278.

<sup>60.</sup> *Smith v. Nashua St. Ry.* (N. H.), 44 Atl. 133; *McDonald v. Toledo Consolidated St. R. Co.* (C. C. App. 6th C.), 43 U. S. App. 79, 74 Fed. 104, 36 Ohio L. J. 49, 29 Chic. Leg. N. 35, 1 Ohio Dec. Fed. 294.

a reasonable time to remove the same had elapsed.<sup>61</sup> Where a municipality, by its charter, is given power "to make, ordain and establish such by-laws, ordinances, rules and regulations as shall appear to them requisite and necessary for the security, welfare and convenience of said city and its inhabitants, and for preserving health, business and government within the limits of the same"—authority is conferred to require street railroad companies to prevent dust on their tracks by watering them.<sup>62</sup>

**§ 6. Reports; license fees and percentages to municipality.—**  
It is reasonable for a municipality to require reports at certain stated periods from street railroad companies operating within its limits as to the number and kinds of cars in use, number of passengers carried, and as to other matters, to enable the common council to regulate the traffic, so as to furnish a safer and better service to the public; and also to see that the payments to be made to the municipality by the company under the provisions of its charter are all that should be made. A requirement of quarterly reports of the passengers carried is not unreasonable, in restraint of trade,

61. *Prime v. Twenty-second St. R. Co.* (N. Y.), 1 Abb. N. C. 63; *Christopher & Tenth St. R. Co. v. Mayor*, id. 79. But see *Johnston v. Christopher & Tenth St. R. Co.*, id. 75.

62. *City & Sub. R. Co. v. Savannah*, 77 Ga. 731, 4 Am. St. Rep. 106; *Chester v. Chester T. Co. (C. P.)*, 5 Pa. Dist. 601, 6 Del. Co. Rep. 397. Where a street railway company lays a hose across a public highway from a hydrant at one side to a tank cart on the

company's track, for the purpose of filling the tank with water to be used in sprinkling the company's tracks, it should give such warning of the obstruction as would be reasonably required to protect any traveler from injury occasioned thereby, whether such warning was in fact given is a question for the jury. *North Jersey St. Ry. Co. v. Morhart*, 64 N. J. L. 236, 45 Atl. 812. See *Smith v. Railway*, 69 N. H. 504.

or in conflict with the Federal Constitution, where the statute authorized the municipality to adopt such municipal regulations concerning street railroads within its limits as the public interest and convenience might require.<sup>63</sup> And the city officials clothed with power to make such an ordinance cannot agree to receive a less amount from the company than is really due to the city as a consideration for the company's permission to permit the city officials to examine, from time to time, the books of the company to ascertain if the reports made by the company, according to municipal regulation therefor, are correct and true, if the statute under which the company is operating either expressly or impliedly authorizes such examination.<sup>64</sup> Generally, where license fees for the operation of street cars are imposed there is express legislative authority for the imposition. General authority to make such reasonable rules and regulations in the premises as the interest and convenience of the public may require would not authorize such a tax. It is not merely a police regulation. But power to impose conditions on granting a street railway franchise clothes the municipality with authority to impose license fees or to exact a percentage of earnings as a condition of the franchise.<sup>65</sup> The charter of New York city authorizes the board of aldermen to fix the annual license fee, not exceeding the sum of \$20, for each street or horse car daily operated or used in that portion of the city heretofore known as the city of Brooklyn, and gives general power to the board of aldermen to adopt such regulations

63. *St. Louis v. St. Louis R. Co.*, 89 Mo. 44, 1 S. W. 305.

64. *Cincinnati St. Ry. Co. v. Cincinnati*, 8 Ohio N. P. 80, 11 Ohio S. & C. P. Dec. 15.

65. *Mayor v. E. A. R. Co.*, 118 N. Y. 389, 397, 23 N. E. 550; *New Orleans v. New Orleans, etc.*, R. Co., 40 La. Ann. 587; *Johnson v. Philadelphia*, 60 Pa. St. 445; *State v. Herod*, 29 Iowa, 123.

as to the matter of license fees for other parts of the city of New York as it deems best.<sup>66</sup> The city of Chicago may re-

66. Laws of 1901, vol. 3, §§ 44-50. Section 49, subdivision 17, besides providing for the annual license fee, as stated in the text, for the city of Brooklyn, provides that "every railroad company operating or using such cars shall, on or before the first day of June in each year, certify to the city clerk the average number of cars daily operated and used by said company, which certificate shall be verified by the oath of one of the managing officers of said company, and every such railroad company shall, on or before the first day of July in each year, pay to the chamberlain of the city of New York the license fee so established for the average number of cars so operated and used by said company. The said license fees shall be taken in full satisfaction for the use of the streets or avenues, but the same shall not release said company from any obligations required by law to keep such streets and avenues, or any part thereof, in repair, which said obligations, and the contracts, laws or ordinances, creating and enforcing the same, are hereby continued in full force and operation. But nothing in this subdivision contained shall be construed to release any railroad company in the city of New York as constituted by this act, from any duty or obligation existing at the time this act takes effect by virtue of any law, ordinance or contract. Ordinances in relation to the matters mentioned in this section

may provide for the enforcement thereof in the manner specified in section 44 of this act as amended."

Sections 44 and 45 are as follows:

"§ 44. Board of aldermen; enumeration of powers not restrictive; general power.—No enumeration of powers in this act shall be held to limit the legislative power of the board of aldermen, which, in addition to all enumerated powers, may exercise all of the powers vested in the city of New York by this act, or otherwise, by proper ordinances, rules, regulations and by-laws not inconsistent with the provisions of this act, or with the constitution or laws of the United States or of this state; and, subject to such limitations, may from time to time ordain and pass all such ordinances, rules, regulations and by-laws, applicable throughout the whole of said city or applicable only to specified portions thereof, as to the said board of aldermen may seem meet for the good rule and government of the city, and to carry out the purposes and provisions of this act or of other laws relating to the said city, and may provide for the enforcement of the same by such fines, penalties, forfeitures and imprisonment as may by ordinance or by law be prescribed."

"§ 45. Franchises for street railways.—The board of aldermen is authorized to grant from time to time to any corporation thereunto duly authorized the

quire the payment of license fees as a condition of granting a franchise to a street railroad company, and such company,

franchise or right to construct and operate railways in, upon, over, under and along streets, avenues, waters, rivers, public places, parkways or highways of the city, but no such grant shall be made except upon the limitations and conditions of this act elsewhere provided in respect of the grant by the board of aldermen of franchises and rights in or under the streets, avenues, waters, rivers, public places, parkways and highways of the city. The board of aldermen may pass appropriate ordinances not inconsistent with law or with this act, or with the vested rights of existing companies or corporations, to enforce the provisions of this section and to carry out its purposes. Nothing in this act contained shall repeal or affect in any manner the provisions of the rapid transit acts applicable to the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York, or any municipality united therewith or territory embraced therein, or to repeal or affect the existing general laws of the state in respect to street surface railroads. The consent or approval of the board of aldermen to or for the issue of corporate stock of the city of New York, as provided by section one hundred and sixty-nine shall not be necessary to authorize the comptroller to issue such stock for the purposes prescribed in chapter four of the laws of eighteen hundred and ninety-one as amended. The

board of estimate and apportionment and the comptroller of the city of New York shall, anything herein contained to the contrary notwithstanding, be subject to all the duties and obligations prescribed in said chapter four of the laws of eighteen hundred and ninety-one as amended for the board of estimate and apportionment and comptroller therein mentioned. Upon the execution of any contract made pursuant to chapter four of the laws of eighteen hundred and ninety-one as amended, the board of rapid transit railroad commissioners may, in its discretion, make request upon the board of estimate and apportionment for the authorization of such corporate stock, either for such amounts from time to time as they shall deem the progress of the work to require, or for the full amount sufficient to pay the entire estimated expense of executing such contract. In case they shall make requisition for the entire amount, the comptroller shall endorse on the contract his certificate that funds are available for the entire contract whenever such stock shall have been authorized to be issued by said board of estimate and apportionment; and in such case such stock may be issued from time to time thereafter in such amounts as may be necessary to meet the requirements of such contract. The certificate of the comptroller, mentioned in section one hundred and forty-nine of this act, shall not be necessary to make such con-

on accepting the franchise, becomes liable to pay such fee.<sup>67</sup> It should be remembered however that a city can impose no terms on the construction of a street railroad upon its streets where the city's consent is not made necessary for the construction of such road.<sup>68</sup> Usually there is express legislative authority for the larger municipalities to exact a certain percentage of the gross earnings of the street railroad company as a condition for the permission to operate within the city limits.<sup>69</sup>

tract binding on the city of New York."

67. *Burn v. Chicago, etc., Co.*, 63 Ill. App. 438, 1 Chic. L. J. W. 533.

68. *Philadelphia v. Empire Pass. R. Co.*, 177 Pa. St. 382, 35 Atl. 721.

69. The New York statute is as follows:

"§ 95. Percentage of gross receipts to be paid in cities or villages; report of officers.— Every corporation building or operating a railroad, or a branch or extension thereof, under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, within any city of the state having a population of one million two hundred thousand or more, shall, for and during the first five years after the commencement of the operation of any portions of its railroad annually, on November first, pay into the treasury of the city in which its road is located, to the credit of the sinking fund thereof, three per cent. of its gross receipts for and during the year ending September thirtieth next preceding; and after the ex-

piration of such five years, make a like annual payment into the treasury of the city to the credit of the same fund, of five per cent. of its gross receipts. If a street surface railroad corporation existing and operating any such railroad in any such city on May six, eighteen hundred and eighty-four, shall have thereafter extended its tracks or constructed branches therefrom, and shall operate such branches or extensions under the provisions of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, or of this article, such corporation shall pay such percentages only upon such portion of its gross receipts as shall bear the same proportion to its whole gross receipts as the length of such extension or branches shall bear to the entire length of its line. In any other incorporated city or village the local authorities shall have the right to require, as a condition to their consent to the construction, operation or extension of a railroad under the provisions of this article, the payment annually of such percentage of gross receipts, not exceeding three per

**§ 7. Location of track.**— The power and duty to determine as to the location of street surface railroad tracks upon city streets usually devolves upon the municipal authorities. This power is not affected by a constitutional provision such as is contained in the New York Constitution inhibiting the granting of exclusive franchises or special privileges or immunities. Although such constitutional provisions are limitations upon legislative power, they do not limit the authority of a municipal corporation to designate streets in which the surface railroads may be constructed, and to impose the con-

cent., into the treasury of the city or village as they may deem proper. In case of extension the amount to be paid shall be ascertained in the manner heretofore provided. The corporation failing to pay such percentage of its gross earnings shall, after November first, pay in addition thereto five per cent. a month, on such percentage until paid. The president and treasurer of any corporation required by the provisions of this article to make a payment annually upon its gross receipts shall, on or before November first in each year make a verified report to the comptroller or chief fiscal officer of the city of the gross amount of its receipts for the year ending September thirtieth, next preceding, and the books of such corporation shall be open to inspection and examination by such comptroller or officer, or his duly appointed agent, for the purpose of ascertaining the correctness of its report as to its gross receipts. The corporate rights, privileges and franchises acquired under this

article or such chapter by any corporation, which shall fail to comply with all the provisions of this section, shall be forfeited to the people of the state, and upon judgment of forfeiture rendered in an action brought in the name of the people by the attorney-general, shall cease and determine." (Railroad Law, as amended by chap. 676 of 1892, 3 Heydecker's Gen. Laws [2d ed.], 3314.)

Under an ordinance requiring street railroads to pay \$4 per lineal foot for each car and  $2\frac{1}{2}$  per cent. of the gross earnings at the time of the acceptance of the franchise, the street railroad company must pay then and annually thereafter, in advance, upon each car run by it, the sum of \$4 per lineal foot, inside measurement. The payment is a condition precedent to the right to run the road, and in estimating the amount due on each car no allowance will be made for the time the car was not in actual operation. Cincinnati St. Ry. Co. v. Cincinnati, 8 Ohio N. P. 80, 11 Ohio S. & C. P. Dec. 15.

ditions upon which they may be operated.<sup>70</sup> The power so devolved upon the municipal council cannot be delegated. They must themselves determine the question whether one or two tracks shall be laid and on what part of the street they shall be placed, and where sidings, cross-overs, and switches shall be built. These questions cannot ordinarily be left to the discretion of the company under the usual statute regulations.<sup>71</sup> Of course, where a street railroad company has permission by its charter to lay its tracks in the city streets, not subject to the control of the municipal authorities, it may lay the track wherever in its opinion it is for the company's best interest;<sup>72</sup> and in the absence of a statutory prohibition,

70. Chicago City R. Co. v. People, 73 Ill. 541. The city council may, in the exercise of its control and supervision of the streets, designate the part to be occupied by a street railroad company. Schmitt v. New Orleans, 48 La. Ann. 1445, 21 So. 24.

71. State, Theberath v. Newark, 57 N. J. L. (28 Vroom) 309, 30 Atl. 528; Citizens' St. Ry. Co. v. Jones, 34 Fed. 579. If a statute forbids the laying of railroad tracks in a street without the consent of the governing municipal board be first obtained, that board must know what particular tracks are to be laid before it gives its consent; and if it be authorized to designate the number of street railroad tracks that shall be laid in a street, lane, or avenue of the city, its ordinance authorizing the laying of double tracks cannot be set aside as unreasonable. State, Kennelly, Pros. v. Jersey City, etc., Ry. Co. (N. J. Sup.), 5 Am. Electl. Cas. 146. A general charter power

to construct a line of street railroad authorizes the construction of double tracks on the streets of a city, provided the municipal authorities consent. Brown v. Atlanta R. & P. Co. (Ga.), 39 S. E. 71. And see Ruckert v. Grand Ave. Ry. Co. (Mo.), 63 S. W. 814.

72. Cambal v. Met. St. R. Co., 82 Ga. 320, 9 S. E. 1078. By a statute in New York, a street surface railroad cannot be constructed or extended upon ground occupied by buildings belonging to any town, city, county, or to the State, or to the United States, or in public parks, except in tunnels to be approved by the legal authorities having control of such parks, and also, except that with certain provisions, a portion of the city of Niagara Falls is excepted from the prohibition. 3 Heydecker's Gen. Laws (2d ed.), 3323, § 108; Railroad Law, § 108, as amended by chap. 460 of 1892, chap. 676 of 1892, and chap. 710 of 1899.

it may locate its tracks on one side of the street.<sup>73</sup> It must however so construct and maintain its tracks that as little injury as possible will result either to the public or to adjoining owners.<sup>74</sup> If such location and maintenance have the authorization and approval of the municipal authorities the company is relieved from the charge of maintaining a nuisance in the highway; and it becomes liable for interference with the highway only in case it fails to use proper care and skill in the construction of the railroad which it was authorized to build and maintain thereon.<sup>75</sup> The company however cannot depart in any material degree from its authorized location without being liable as for maintaining a nuisance, whether its location be fixed by statute or ordinance.<sup>76</sup>

73. Niemann v. Det. Sub. St. R. Co., 103 Mich. 256, 1 Am. & Eng. R. Cas. (N. S.) 172, 61 N. W. 519.

74. Schild v. Central Park, N. & E. R. R. Co., 133 N. Y. 446, 45 St. Rep. (N. Y.) 656, 31 N. E. 327.

75. Wood v. Third Ave. R. Co., 13 Misc. Rep. (N. Y.) 308, 34 N. Y. Supp. 698; Clifford v. Dam, 81 N. Y. 52; Bellinger v. N. Y. C. R. Co., 23 id. 42.

76. Matter of Met. Transit Co., 111 N. Y. 588, 19 N. E. 645; Commissioners v. South Bend, etc., R. Co., 118 Ind. 68, 20 N. E. 499. In the case last cited, considerations of great convenience and a large outlay of money on the part of the company were held to be no excuse for nonperformance of the conditions of location. So where the statute required that the street railroad should be constructed "as nearly as possible" in the middle of the street, it was held that the words meant "as nearly as practicable;" and the fact that the

convenience of the public would be promoted by having the railroad on the side of the street did not warrant the departure from the statutory provisions. Finch v. Riverside, etc., R. Co., 87 Cal. 597, 25 Pac. 765. And see City of Philadelphia v. Continental Pass. R. Co., 11 Phila. (Pa.) 315. Wherever the statute does fix the location, an ordinance in disregard of the statute provision is void. People v. Riche, 54 Cal. 74; Omnibus R. Co. v. Baldwin, 57 Cal. 160, 1 Am. & Eng. R. Cas. 316. The location in a public street of a street railroad is trespass as against the owner of the fee, unless it be made as a part of one of the routes which the company has authority to use. Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Collins v. Carbondale (C. P.), 5 Pa. Dist. 18. In Pennsylvania, street railroads cannot lay their lines across the country for passenger traffic from one town to

But slight deflection may be made.<sup>77</sup> And if the charter of the railroad company provides that each route should be selected and the approval of the city council obtained before any work thereon should be commenced, the work can derive no benefit from a general ordinance granting authority to construct street railroads on any street in the city, unless the route has been previously selected by the company and submitted to the council for its approval.<sup>78</sup> If an owner of land plat it into lots within the city limits and

another, but will be restricted to highways for the accommodation of local traffic along their line. *Rahn Township v. Tamaqua & L. St. R. Co.*, 167 Pa. St. 84, 31 Atl. 472, 36 W. N. C. 165. Successors of a railroad company chartered to construct a belt line around a city within a certain distance from its center, consisting of a single or double track three feet standard narrow gauge railroad, cannot without the consent of the city lay down a third rail in a city street converting the narrow gauge into a standard gauge road and operate such road as part of a great line employed in transporting freight and passengers throughout the country. *Walker v. Denver (C. C. App. 8th C.)*, 22 C. C. A. 470, 40 U. S. App. 464, 76 Fed. 670.

77. *Elmira v. Maple Ave. R. Co.*, 4 N. Y. Supp. 943; *State v. Newport St. R. Co.*, 16 R. I. 533; *Commonwealth v. Wilkesbarre, etc., R. Co.*, 127 Pa. St. 278. Where the mayor and common council approve a plan for locating railroad tracks in a city authorizing the building of a crossover at a certain point, the location of such cross-

over 530 feet east of such point is not a compliance with the plan. *City of Hartford v. Hartford St. Ry. Co. (Conn.)*, 47 Atl. 330.

78. *West End, etc., R. Co. v. Atlanta St. R. Co.*, 49 Ga. 151; *Concord v. Concord H. R. Co.*, 65 N. H. 630, 8 Atl. 87; *State, Wilbur v. Trenton Pass. R. Co.*, 57 N. J. L. (28 Vroom) 212, 31 Atl. 238. Where the franchise of a street railroad company provided that the track should be laid along the north side of the highway and in such manner as to obstruct as little as possible the free passage of vehicles "along" the highway, and that that portion of the roadway lying adjacent to the south rail of the track be properly dressed to the track in order that vehicles might easily cross, the highway being sixty-six feet wide with a space of about sixteen feet in the middle thereof used for a driveway, wherever the track comes into the sixteen-foot driveway the company must continue its grading. It need not grade however wholly without such driveway farther than the south rail. *People v. Detroit, etc., Ry. Co. (Wis.)*, 81 N. W. 336.

plat a public street thereon and sell lots with reference thereto, and then execute a warranty deed to a railroad corporation conveying right to construct and operate a street railroad upon the street according to the plat thereof, with all the rights incident to the operation of railroads, the company does not thereby acquire an exclusive use of the entire street for railroad purposes. Its right in the street is subservient to the control of the municipal authorities whenever the street is accepted as one of the public streets of the city.<sup>79</sup> Where the route has been established and the location of the tracks designated by the proper authorities, these authorities cannot be enjoined from requiring the company to change the location of its tracks, where such change is neither unreasonable or arbitrary.<sup>80</sup> But without the consent of the

79. *Murray Hill Land Co. v. Milwaukee Light, Heat & Traction Co.* (Wis.), 86 N. W. 199.

80. *Macon Consolidated St. R. Co. v. Macon*, 112 Ga. 782, 38 S. E. 60. In the case cited it was also held that the municipality could not make a valid contract abrogating or restricting its legislative or discretionary power with reference to the location of the tracks of the street railroad company; and any agreement by which it did undertake to divest itself of such power could not be used as a foundation for an estoppel against it. *West Phila. Pass. Ry. Co. v. Philadelphia*, 10 Phila. (Pa.)

70. Having acquired the right to construct a part of its road in and over certain streets, a company may subsequently, with the consent of the proper authorities, relay its tracks upon other streets and remove the tracks first laid; and an

abutting owner cannot prevent such change. *Hoyle v. New Orleans City R. Co.*, 23 La. Ann. 535; *Atty.-Gen. v. Chicago, etc., R. Co.*, 112 Ill. 611. A street railroad company has no cause of action against the city for expenses incurred in relaying its tracks at the request of the city to conform to a change made in the street by the city, where the ordinance granting the franchise imposes upon it all such expense. *Ashland St. R. Co. v. Ashland*, 78 Wis. 271, 47 N. W. 619. A legislative grant to a railroad corporation of the right to lay tracks in streets of a city does not divest the city authorities of municipal control over the operation of the road. Under the present Constitution of Missouri, the consent of the city to such use of the streets is necessary. *Atlantic, etc., Ry. Co. v. St. Louis*, 3 Mo. App. 315.

municipal authorities the railroad company cannot relay its tracks in the new location, although such new location be upon private property.<sup>81</sup>

**§ 8. Construction of roadbed, track, turnouts, and switches.—** A railroad corporation having its rails in a public highway must lay and keep them so as to cause as little injury as possible. The highway, or street, used for the rails must be maintained, as nearly as possible, as fit for the use of the public, who travel on foot or in vehicles, as it was before, having due regard to the necessity for the rails being there. Whether the rails are so laid as to constitute on its part the neglect of proper conditions for the public safety is a question of fact for the jury, and not one of law for the court to pass upon.<sup>82</sup> The manner of the construction, if it be in the control and within the jurisdiction of municipal authorities, cannot be governed by a court of equity.<sup>83</sup> And where the charter of the company authorizes it to operate its road in such streets as shall be determined by the common council with the company's consent, and on compliance with such conditions and under such regulations as the council shall impose, an ordinance permitting the company to use certain streets and prescribing the use of certain kinds of rails is not such a contract as precludes the municipal authorities from subsequently changing the rails so as to conform to the street paving without the company's assent. The regulations which the council may impose are not limited to the time

81. *Matter of South Beach Ry. Co.*, 53 Hun (N. Y.), 131.

82. *Schild v. C. P., N. & E. R. Co.*, 133 N. Y. 446, 45 St. Rep. (N. Y.) 656, 31 N. E. 327; *Cline v. Crescent City Ry. Co.*, 41 La. Ann. 1031, 6 So. 851; *Keitel v. St. Louis,*

etc., Ry. Co., 28 Mo. App. 332; *Willis v. Erie City Pass. R. Co.*, 188 Pa. St. 56, 41 Atl. 307.

83. *Rankin v. St. Louis & B. Sub. Ry. Co.* (U. S. C. C. Ill.), 98 Fed. 479.

when the road is built.<sup>84</sup> The city may require the railroad to conform to the grade of the rest of the street; and if the street grade be changed, thereby requiring the change of grade of the railroad, the company owning the road has no valid claim for damages.<sup>85</sup> Being duly chartered and having secured the consent of all the local authorities of the townships and municipalities through which its road extends, it may begin the construction of the railroad in any part of the route, whether it be the charter route or an extension.<sup>86</sup> But it has no right to build any part of its line until it has the right to complete it, unless it has the general power of eminent domain.<sup>87</sup> Having built its line pursuant to the direction of the township authorities, made in view of a contemplated lowering of the grade, it is not chargeable with negligence therefor.<sup>88</sup> A mere delay in travel, following as

84. Pawcatuck Valley St. R. Co. v. Town Council of Westerly, 47 Atl. 691; Detroit v. Fort Wayne, etc., R. Co. (Mich.), 50 Am. & Eng. R. Cas. 447; Albany v. Watervliet, etc., Co., 45 Hun (N. Y.), 442; affd., 108 N. Y. 14; Easton, etc., Pass. Ry. Co. v. Easton, 133 Pa. St. 505, 43 Am. & Eng. R. Cas. 253, 19 Atl. 486.

85. Ashland St. Ry. Co. v. Ashland, 78 Wis. 271, 47 N. W. 619; North Chicago City R. Co. v. Lake View, 105 Ill. 184, 11 Am. & Eng. R. Cas. 42, 44 Am. Rep. 788. But a covenant by a street railroad company on acquiring a franchise entitling it to construct, operate, and maintain a line of railroad through specified streets, that it will maintain the streets in first-class order between the tracks and two feet on each side thereof, does not impose on the company the

additional duty of elevating the entire surface of the streets on both sides of the track to the height of its roadbed. State, New Orleans v. New Orleans Traction Co., 48 La. Ann. 567, 19 So. 565. Municipal consent to the laying of a street railroad does not authorize the laying of two distinct street railroads on the same street. West Jersey Traction Co. v. Camden H. R. Co., 53 N. J. Eq. (8 Dick.) 163, 35 Atl. 49.

86. Hann v. Media, etc., R. Co. (Pa.), 8 Del. Co. Rep. 91.

87. Penn. R. Co. v. Montgomery Co. Pass. R. Co., 167 Pa. St. 62, 27 L. R. A. 766, 1 Am. & Eng. R. Cas. (N. S.) 190, 31 Atl. 468, 36 W. N. C. 153.

88. Miller v. Lebanon & A. St. R. Co., 186 Pa. St. 190, 42 W. N. C. 274, 40 Atl. 413.

a consequence of the lawful construction of its tracks in the streets, is not a damage to property not directly abutting upon the street where the tracks are laid.<sup>89</sup> Nor indeed could an abutting owner maintain an action therefor unless the delay were unreasonable. Unless by law or its charter a railroad company is under obligation to lay and maintain its tracks in a street in a particular manner, it may and must adopt such modes of construction as are most approved for such roads.<sup>90</sup> It cannot, by contract with an individual, bind itself that it will not in the future lay down more than a single railway track in a designated street, as public necessity may require otherwise.<sup>91</sup> A street railroad company has the right to put down such appliances, in the way of turnouts and switches and sidetracks, as are needful for the convenient use of its franchise. The only restriction upon the use of this right is that the use may not be negligent or unskillful, or without reasonable care therein.<sup>92</sup> Such necessary switches and turnouts are not obstructions of the street so as to warrant their summary and forcible removal by police intervention without notice or a hearing, unless it clearly appears that the authority to construct them has been exceeded.<sup>93</sup> An ordinance authorizing the construction of

89. Robert Mitchell Furniture Co. v. Cleveland, 7 Ohio N. P. 639, 10 Ohio S. & C. P. Dec. 218.

90. Fitts v. Cream City R. Co., 59 Wis. 323, 18 N. W. 186.

91. Doane v. Chicago City R. Co., 57 Ill. App. 353, 8 Nat. Corp. Rep. 27.

92. Wooley v. Grand St. & N. R. Co., 83 N. Y. 121, 126; Carson v. Central R. Co., 35 Cal. 325; Wilkesbarre v. Coalville Pass. R. Co. (C. P.), 8 Kulp (Pa.), 298.

Authority to "lay tracks and operate its road upon the center" of a designated street carries with it the right to put down a switch and siding necessary for the accommodation of the public. Wyoming v. Wilkesbarre, etc., R. Co. (C. P.), 8 Kulp (Pa.), 113.

93. Cape May v. Cape May, etc., R. Co., 60 N. J. L. 224, 39 L. R. A. 609, 37 Atl. 892, 7 Am. & Eng. R. Cas. (N. S.) 585.

"such turnouts, switches, and sidetracks as may be necessary," and providing that the whole length of road shall be deemed one route, does not authorize the construction of a Y switch to make a turning point for another street railway company.<sup>94</sup>

#### § 9. Remedies for unauthorized or defective construction.—

The unauthorized, continuous obstruction of a public highway is an act which in law amounts to a public nuisance, and a person who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance and to recover the special damages by him sustained.<sup>95</sup> The corporation creating and maintaining the obstruction may be indicted for maintaining a public nuisance,<sup>96</sup> or an action may be maintained against it by the proper authorities to have the nuisance abated, or for an injunction against it.<sup>97</sup> And if the duty as to the construction or maintenance is imperative, the proper authorities may proceed by mandamus

94. *Rapid R. Co. v. Mt. Clemens*, 118 Mich. 133, 76 N. W. 318, 5 Det. Leg. N. 475.

95. *Wakeman v. Wilbur*, 147 N. Y. 657, 663, 42 N. E. 341; *Van Horn v. Newark*, etc., *Pass. R. Co.*, 48 N. J. Eq. 332, 50 Am. & Eng. R. Cas. 235; *Larrimer, etc., St. R. Co. v. Larrimer*, 137 Pa. St. 533; *Met. City R. Co. v. Chicago*, 96 Ill. 620, 2 Am. & Eng. R. Cas. 291; *Nichols v. Ann Arbor*, etc., *R. Co.*, 87 Mich. 361, 49 N. W. 538. Unless a particular injury is suffered by the individual, the question of the validity of the ordinances under which the street railroad company constructed and operated its road, and the fact that

it failed to complete its road in conformity therewith, can only be raised by the State or city granting the franchise. *Kitchell v. Manchester R. El. Ry. Co.*, 79 Mo. App. 340, 2 Mo. App. Rep. 457.

96. *Commonwealth v. Old Colony, etc., R. Co.*, 14 Gray (Mass.), 93; *Pittsburg, etc., R. Co. v. Commonwealth*, 101 Pa. St. 192, 10 Am. & Eng. R. Cas. 321.

97. *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673; *Stamford H. R. Co. v. Stamford*, 56 Conn. 381, 36 Am. & Eng. R. Cas. 140; *Commonwealth v. Erie, etc., R. Co.*, 27 Pa. St. 339; *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307, 25 Am. & Eng. R. Cas. 252.

against the company to compel its performance.<sup>98</sup> Rarely however would an unauthorized construction, and never a defective construction, work a forfeiture of the charter, unless there be an express provision to that effect contained therein.<sup>99</sup> If the statute, or the franchise of the company, or any ordinance the municipality were authorized to adopt, prescribes specifically the remedy for an unauthorized or defective construction of the railroad in the streets, such remedy of course must be pursued. A street railroad corporation having, by contract duly recorded, the exclusive right to build its road through the land of a railroad company to its depot, can restrain another company from interfering with its road by any unauthorized construction.<sup>1</sup> In the absence of statutory provision as to the manner in which an order of the common council directing the street railroad company to remove obstructions from the street shall be brought to the company's notice, the mailing of a copy of the order to the company by the city clerk and oral notice of its passage by the person on whose complaint the order was made is sufficient.<sup>2</sup>

**§ 10. Construction and maintenance; how enforced.**— Permission to construct and operate a street railroad in the streets of a city, although accepted by the company, does not create such an obligation upon it as may be enforced in equity or by mandamus. But if the company has entered upon the streets and made a partial construction of its track, the duty to complete it according to the provisions of its charter or

98. Ohio & Mississippi Ry. Co. v. People, 100 Ill. 200, 30 Am. & Eng. R. Cas. 509.

99. People v. A. A. R. Co., 125 N. Y. 513, 26 N. E. 622.

1. Fort Worth St. R. Co. v. Queen City R. Co., 71 Tex. 165, 9 S. W. 94.

2. Hartford v. Hartford St. R. Co. (Conn.), 47 Atl. 330.

franchise is imperative, and its performance may be so enforced.<sup>3</sup> If the charter or franchise requires the construction to be completed within a limited time, and also provides that otherwise the company's rights should be forfeited, a proceeding to have the forfeiture declared and enforced may be successfully maintained,<sup>4</sup> unless the failure to complete the road is in nowise the fault of the company; as for example when there has been interference on the part of the city authorities or by the courts.<sup>5</sup> If after the expiration of the time the municipality permits the company to proceed with the work of construction it may be estopped from claiming a forfeiture.<sup>6</sup> If it be provided that the road shall be "completed within one year, and so much of said right of way as may not be occupied by said company within said time shall be considered abandoned," the company forfeits its right to construct the unfinished portion of the road after the expiration of the year.<sup>7</sup>

**§ 11. Placing electrical conductors underground.—** Although under due authority of law and municipal consent an elec-

3. *State, Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 11 Am. & Eng. R. Cas. (N. S.) 62; *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369. A railroad constructed in a city street under legislative and municipal sanction is not a nuisance if laid down in the most approved mode of constructing street railroads. *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409.

4. *People v. B. R. Co.*, 126 N. Y. 29, 26 N. E. 961, 48 Am. & Eng. R. Cas. 692; *Hovelman v. Kansas City H. R. Co.*, 79 Mo. 632, 20

Am. & Eng. R. Cas. 17; *People v. Los Angeles El. R. Co.*, 91 Cal. 338, 27 Pac. 673.

5. *State v. Cockren*, 25 La. Ann. 536; *Coney Island, etc., Co. v. Kennedy*, 15 App. Div. (N. Y.) 588, 44 N. Y. Supp. 825; *Chicago v. Chicago, etc., R. Co.*, 105 Ill. 73, 10 Am. & Eng. R. Cas. 306; *Schmidt v. Market St. & W. G. R. Co.*, 90 Cal. 37, 27 Pac. 61.

6. *New Orleans, etc., R. Co. v. New Orleans*, 44 La. Ann. 748, 11 So. 77.

7. *Houston v. Houston, etc., R. Co.*, 84 Tex. 581, 50 Am. & Eng. R. Cas. 380, 19 S. W. 786.

trical street surface railroad has constructed its road, placing its poles upon and stringing its wires along the streets of a city, it does not follow that it has a right permanently to carry the electricity requisite for the successful operation of its road in such manner. The exercise of its rights is subject always to the regulation and control of the legislature. By giving the franchise the State did not abdicate its power over the public streets, nor in any way curtail its police powers to be exercised for the general welfare of the people, nor absolve itself from its primary duty to maintain the streets and highways of the State in a safe and proper condition for public travel and other necessary street and highway purposes. The grant of a right in the street, if any there be, in such a franchise was made in reference to the streets and their maintenance and regulation forever as streets. The State could at all times regulate the size and location of the poles, the height of the wire from the surface of the ground and their location in the streets; and when the poles and wires become a serious obstruction and nuisance in the streets from any cause, it could take such action and make such provisions by law as were needful to remove the nuisance and restore the utility of the streets for public purposes.<sup>8</sup> In the large cities of the land these poles and wires

8. A. R. T. Co. v. Hess, 125 N. Y. 641, 646, 26 N. E. 919. In the case cited the court further said: "The right of the plaintiff to maintain and operate its wires in the streets could certainly be no greater than the right of railroads, which by public authority occupy the streets and highways of the State. The State, in the exercise of its police power, and the regulating control which it has over

corporations created by its authority, may exercise a general supervision over such corporation. It may prescribe the location of the tracks, the size and character of the rails, the precautions which shall be taken for the protection of the public and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in

have become a serious obstruction and nuisance in the streets, and the legislature has, either directly in the charters granted to the cities or by general provision of law, authorized the making of subways within which the municipality might direct that all electrical conductors should be placed. In New York, as early as 1884, a law was enacted requiring practically all electric and other wires and cables to be removed from the surface of all streets or avenues in every city of the State having a population of 500,000 or over.<sup>9</sup> The

the control and regulation of the franchises which such corporations have obtained by statutory authority."

The opinion of Judge EARL also contains the history of the subways legislation theretofore had in the State, and it is there said, page 648: "Subways having been constructed in certain of the streets of the city of New York by the Consolidated Telegraph and Electrical Subway Company, under the supervision and with the approval of the board of electrical control, notice was given to the plaintiff, as provided in the act, to remove its poles and wires from the streets, and place its electrical conductors in such subways. Having refused to comply with such notice and with the provisions of the act, the commissioner of public works of the city caused the poles to be cut down and the wires to be removed from the streets; and this is what the plaintiff complains of. Its property was not taken for public use; it was simply removed from the streets where it had become a nuisance, and the public authorities had the same

right to remove it from the streets, doing no unnecessary damage, that it had to remove any other incumbrance therefrom. After the passage of the acts referred to and the building of the subways, and the notice to the plaintiff, it had no right longer to maintain its poles and wires above the surface of the street. They were then there without authority, and thus became a nuisance, and hence the public officials had the right to remove them." *State v. Street Commissioner*, 7 Am. Electl. Cas. 124, 71 Conn. 657; *Telephone Co. v. Baltimore*, 7 Am. Electl. Cas. 135, 89 Md. 689; *C. & P. Teleph. Co. v. Baltimore*, 7 Am. Electl. Cas. 151, 90 Md. 638; *Baltimore v. Telephone Co.* (Ct. App. Md.), 7 Am. Electl. Cas. 158; *Telephone Co. v. Minneapolis*, 7 Am. Electl. Cas. 168, 81 Minn. 140; *N. W. Teleph. Co. v. Minneapolis* (Minn. Sup. Ct., May, 1901), 7 Am. Electl. Cas. 179.

9. Laws of 1884, chap. 534. By chapter 499 of 1885, provision was made in detail for enforcing the act of 1884 in all cities of the State having more than 500,000 and less than 1,000,000 of population; and

trend of legislation seems to be toward authorizing municipalities to build the necessary subways, or to empower a private corporation to build the same under municipal direction and control, and require all corporations using electricity for light, heat, or power to place their wires within such subways, upon terms to be arranged with the corporation controlling the subway, subject however to the supervision of the municipality. It cannot be successfully claimed that a corporation whose business requires it to convey electricity within the limits of a municipality cannot be compelled to place its electrical conductors in such a subway without violating rights guaranteed to the corporation by the Federal Constitution, simply because it has a franchise previously granted; unless the subways were so constructed as to require wires of different voltage to be placed in close proximity and in such manner as to materially interfere in the proper management of the corporation's business. The interference however would have to amount to a substantial denial of the right to exercise the privileges acquired by it under the legislative authority of the State.<sup>10</sup>

the mayor, comptroller, and commissioner of public works of such cities were authorized and directed to appoint three disinterested persons, residents of the respective cities for which they should be appointed, to be a board of commissioners of electrical subways.

The statutes particularly applicable to New York city are sections 525 and 526 of the charter of the city of New York, vol. 3, Laws of N. Y. of 1901, p. 235, and chap. 716 of 1887, 231 of 1891, and 263 of 1892, and the laws amendatory thereof and supplemental thereto.

<sup>10</sup>. City of Rochester v. Bell Tel. Co., 52 App. Div. (N. Y.) 6; People ex rel. N. Y. Electrical Lines v. Squire, 107 N. Y. 593, 14 N. E. 820. In the case last cited Chief Judge RUGER, in reference to such statutes, said: "The necessity of these acts sprung out of the great evil, which, in recent times, has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communi-

The city must see to it that reasonable skill in constructing its conduits is exercised, to the end that the operations of the corporation using a weak current shall not be embarrassed by the presence in the same conduit of wires charged with powerful currents of electricity. Where the statute leaves it discretionary with the city whether it shall itself construct the conduits or allow the electrical corporations to do so, the

cation between distant points, and which require in their enterprises the occupation, not only of the surface and air above the streets, but indefinite space underground. This evil had become so great that every large city was covered with a network of cables and wires attached to poles, houses, buildings, and electric structures, bringing danger, inconvenience, and annoyance to the public. \* \* \* These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to by requiring all such wires to be placed underground in such cities, and be subject to the control and supervision of local officers who could reconcile and harmonize the claims of conflicting companies, and obviate, in some degree, the evils which had grown up almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the contract rights of such companies, but to regulate and control their exercise."

Upon appeal to the United States Supreme Court the decision of the New York Court of Appeals was affirmed, and with reference to the right of the city to control the subways the Supreme

Court said: "It would be an anomaly in municipal administration if every corporation that desired to dig up the streets of the city and make underground connection for sewer, gas, water, steam, electricity, or other purposes should be allowed to proceed upon its own theory of what were plans for it to adopt and proper excavations to make. The evils that would follow from such a system of practice would be a great gravity to the public, and would entail endless disputes and bickerings with prior parties having equal rights. The utmost that can be said against the acts of 1885 and 1886 is that they transferred the supervision and control of the matters of excavation of the streets and the construction of underground electrical systems from the commissioner of public works to the board of subway commissioners. That is the sum total of the change effected. Not a right of the electrical companies was violated, and no contract was impaired. The expressly reserved power of the State or municipality to regulate the use of the streets and highways in such manner as not to injuriously affect the public interests are merely transferred from one public functionary to an-

determination of the city to build the conduits and their subsequent construction by it, makes it obligatory upon the electrical corporations to use them; and they cannot avoid the obligation because the city has made no rules in regard to such use. The court will assume that suitable rules will be made by the city, and that reasonable facilities and protection will be afforded to each corporation required to use the subway.<sup>11</sup> An exclusive right to maintain subways and conduits for electrical conductors in the streets of a city and to compel all persons and corporations using such conductors to place them in the subways and pay rent for the privilege can only be acquired by contract or by statute.<sup>12</sup> A subway company is not a common carrier. It does not

other. The power was not enlarged; only the agency by which the supervising power of the State was to be exercised was changed." People of the State of New York v. Squire, 145 U. S. 175, 190, 36 L. Ed. 666, 671.

It is not *ultra vires* for a municipal corporation empowered by its charter to regulate the use of streets to enact an ordinance empowering a private corporation organized for public purposes, to occupy streets by subways and electrical apparatus, without requiring that all the public be permitted to use the subways, and without reserving to the municipal authorities the right of supervision or control. State *ex rel.* Nat. Subway Co. v. St. Louis, 7 Am. Electl. Cas. 195, 145 Mo. 551. And see Rochester v. Telephone Co., 7 Am. Electl. Cas. 211, 52 App. Div. (N. Y.) 6; Commonwealth v. Mayor, 7 Am. Electl. Cas. 219; 185 Pa. St. 623; W. U. Tel.

Co. v. Syracuse, 24 Misc. Rep. (N. Y.) 338; State *ex rel.* Gas Light Co. v. Murphy, 5 Am. Electl. Cas. 71; Prentiss v. Cleveland Tel. Co. (Ohio Com. Pl.), *id.* 125, 32 W. L. B. 113.

11. Matter of Geneva v. Geneva Tel. Co., 30 Misc. Rep. (N. Y.) 236, 62 St. Rep. (N. Y.) 172.

12. Empire City Sub. Co. v. B. & S. A. R. Co., 5 Am. Electl. Cas. 66, 87 Hun (N. Y.), 279, 283. In the case cited it was also held that a street surface railroad company lawfully using a cable for motive power in New York city, upon condition and under obligation to use every provision that ingenuity can suggest to operate the cable with safety, may lawfully construct upon its roadbed and use an iron pipe containing electric wires for use in communicating between its powerhouse and its signal-boxes intelligence relating to the operation of

invite employment from the public generally, nor obligate itself to serve the public generally. The business is purely a private one.<sup>13</sup> The occupancy of a subway by a company using electrical conductors with knowledge of the rental demanded, constitutes a contract with the subway company to pay the rental.<sup>14</sup> An action may be maintained by a taxpayer to prevent the execution of a proposed contract with a subway company, if the contract fail to bind the company to construct the subways within the time limited by law.<sup>15</sup> The New Jersey act for the placing of electrical conductors underground, etc., does not authorize the board of commissioners of electrical subways thereby created to grant a franchise for erecting poles and wires in the streets for the transmission of electricity.<sup>16</sup>

**§ 12. Paving and repaving.**— It may be safely stated that in every municipality, either by statute or by ordinance of the

the road, and in order to stop the cable in case of an accident upon its lines, and need not put such wires in the subways of the plaintiff.

The New York Subway Statutes of 1884 and 1885 were held constitutional in the cases above cited, and also in Clausen, etc., Brewing Co. v. B. & O. Tel. Co. (N. Y.), 2 Am. Electl. Cas. 210; W. U. Tel. Co. v. New York, 38 Fed. 552; United Lines Tel. Co. v. Grant, 137 N. Y. 7, 32 N. E. 1005.

13. State v. Murphy, 6 Am. Electl. Cas. 64, 77, 134 Mo. 548, 31 S. W. 784, 34 id. 51, 35 id. 1132. The case cited also held that an ordinance granting to a subway corporation power to lay a subway for electrical wires under all the streets of the city for a period of fifty years was invalid

because the city did not reserve control over the excavations, the laying of wires and all other incidents to the maintenance, construction, and use of the subway.

14. Brush El. Illuminating Co. v. Consolidated Tel., etc., Sub. Co., 60 Hun (N. Y.), 446. Under New York act of 1887, chap. 716, creating the board of electrical control, such board has the duty of determining all questions as to the placing, erecting, constructing, suspension, use, regulation, or control of electrical conductors in the city of New York. U. S. Illuminating Co. v. Hess, 19 St. Rep. (N. Y.) 883.

15. Armstrong v. Grant, 56 Hun (N. Y.), 226.

16. Presbyterian Church v. El. Sub., etc., Pass. R. Co., 55 N. J. L. 436.

municipal authorities, a street surface railroad company operating within its limits is required to pave and to maintain the pavement between the rails of its track and for a certain distance outside of each outer rail. The statute of New York, copied in the note 19 to section 2 of this chapter, requires the railroad corporation to have and keep in permanent repair that portion of the street, avenue, or public place between the rails of its tracks and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so and in such manner as they may prescribe. Under this statute, the Court of Appeals has held that it becomes the duty of the street surface railroad corporation to keep in permanent repair such portion of the street through which it passes as is within its tracks and two feet in width outside of each rail; and that the local authorities of the municipality were vested with the authority to determine when the repairs should be made, and how they should be made, and that the entire street should be repaved and with other material. In case of the neglect of the corporation to repave within thirty days after notice given it to do so, then the local authorities may do the work at the expense of the corporation. But they have no power to charge any portion of the expense of repairing that portion of the street which the statute says the street surface railroad shall keep in repair upon either the abutting owner or the city at large.<sup>17</sup> The duty to pave or

17. Conway v. Rochester, 157 N. Y. 33, 51 N. E. 395; Cambria Iron Co. v. Union Trust Co. of St. Louis, 154 Ind. 291, 56 N. E. 665; People v. Utica, 45 App. Div. (N. Y.) 356, 61 N. Y. Supp. (95 St. Rep.) 31; Lincoln St. Ry. Co.

v. City of Lincoln (Nebr.), 84 N. W. 802.

The laying of sleepers and cross-ties by a street railroad company in streets in which it proposes to construct its road in the future, before such streets are paved by

to repave does not rest upon the railroad corporation where it has a mere license to use the streets for its corporate purposes; and if the charter or franchise specifically provides

the corporate authorities, is not such an appropriation by the company of the streets to its own use as will make it liable for the expense of paving under a provision in its charter that it shall keep its tracks and a space between, and two feet outside the outer rail at all times well paved and in good order. *District of Columbia v. M. R. Co.*, 8 App. D. C. 332, 24 Wash. L. R. 566. A provision in an original grant to a street railroad company authorizing it to construct and operate a railroad in certain streets, relating to the paving of a portion of the streets, does not apply to an extension of the tracks in other streets constructed under authority of a subsequent grant where there is nothing to show that the grant of the authority to build the extension was accepted with the knowledge and understanding on the part of those to whom the concession was made that the terms of the original grant respecting repairs to the street should be included as one of the conditions upon which the right to build the extension was granted. *Mayor v. Eighth Ave. R. Co.*, 7 App. Div. (N. Y.) 84, 39 N. Y. Supp. 959; *Mayor v. N. Y. & H. R. Co.*, 19 id. 67.

Of course if the authority of the municipality is not limited by or under the original franchise it may impose as a condition for granting the right to extend that the railroad company pay the expense of paving in streets previously oc-

cupied. *F. & S. Philadelphia City Pass. Ry. Co. v. Philadelphia*, 17 W. N. C. 345; *Detroit v. Detroit City Ry. Co.*, 37 Mich. 558; *Dallas v. Dallas Consolidated T. R. Co. (Tex. Civ. App.)*, 33 S. W. 757.

Under the New York act a city common council cannot, by a contract with the railroad company, exempt it from full statutory liability imposed by the act as subsequently amended *Weed v. Common Council of Binghamton*, 26 Misc. Rep. (N. Y.) 208, 56 N. Y. Supp. (90 St. Rep.) 105. But the act of May 23, 1901, amending section 93, authorizing cities of the third class to make such contracts and confirming those previously made, passed after the commencement of this suit by the taxpayers to compel a city to disregard the contract and enforce against the company a tax to the full extent provided by law, destroys the right of action. *Weed v. Common Council of Binghamton*, 71 St. Rep. (N. Y.) 282. And such a contract may embrace a subsequent extension of the tracks made by a company formed by the consolidation of the two companies which had previously contracted with the city where the contract provided that it was to apply to any extension of the tracks and be binding on any company with which the contracting companies might be consolidated. *Id.*

Where a condition of the franchise requires a street surface rail-

what the railroad corporation shall do toward paving and maintaining the pavement of the street, its burden cannot be added unto by subsequent enactment unless the right to make such addition is reserved to the municipality. An obligation to keep the street in repair does not compel the company to grade or pave the street. If the language of the

road company to pave a certain part of one of the streets which it is given right to occupy with its tracks, the railroad company may, with the consent of the city, substitute a different portion of the street for that originally designated as against objections on the part of owners of a property abutting on the part of the street originally secured for paving. *Barber Asphalt Pav. Co. v. New Orleans & C. R. Co.*, 49 La. Ann. 1608, 22 So. 955.

Where permission has been granted to a street railroad company to lay its tracks on a paved street, and it is expressly stipulated that no charge for paving should be made against the company the municipal council cannot thereafter, under an act subsequently passed providing that when a street railroad company lays its track on a street already paved the city may require contribution from it for such amount on account of the paving as the mayor and council think proper, enforce, by execution or otherwise, a claim against the company for any portion of the original cost of paving in that street. *Atl. Consolidated St. Ry. Co. v. Atlanta*, 111 Ga. 255, 36 S. E. 667. Under that act so subsequently passed, it is incumbent on the mayor and

general council before granting a street railroad company permission to lay its tracks on a paved street to fix the amount of compensation which will be required of it. *Id.*

The words "property-owners abutting" in an ordinance requiring a street railroad company laying its tracks in a street already paved to pay the property-owners abutting for the paving between the rails do not apply to the city as owner of the streets, so as to require payment for street intersections. *City of Council Bluffs v. Omaha & C. B., etc., Co.* (Iowa), 86 N. W. 222.

A street railroad company may be required to pay its proportionate share of the cost to a city of putting in a new pavement where its charter requires it to keep the space between its track and for two feet outside "well paved and in good order," although the original pavement had been put in but a short time before and proved worthless. *District of Columbia v. M. R. Co.*, 8 App. D. C. 322, 24 Wash. L. Rep. 566.

For a definition of "head" of a street, within the meaning of the Paving Act, see *Kennedy v. Detroit R. Co.*, 108 Mich. 390, 2 Det. Leg. N. 894, 66 N. W. 495.

franchise or other contract is of doubtful construction the practical interpretation by the parties themselves is entitled to great, if not to controlling, influence.<sup>18</sup> If the municipality is merely authorized to require the street railroad corporation to pave and repave between their tracks, then the matter is left in the discretion of the municipality, and in the absence of a direction by its authorities to the railroad company to pave, the entire assessment for paving the streets may be laid upon the abutting owners and the city at large.<sup>19</sup> The duty however to require the street railroad to bear its share of the burden is generally made imperative, and the

18. *Chicago v. Sheldon*, 76 U. S. (9 Wall.) 50, 19 L. Ed. 594; *Kansas City v. Corrigan Consol. St. Ry. Co.*, 86 Mo. 67.

19. *Gilmore v. Utica*, 121 N. Y. 561, 24 N. E. 1009, 31 St. Rep. (N. Y.) 880. The municipal authorities may repeal an ordinance authorized by statute providing that passenger railroad companies extending their tracks through additional streets, with the consent of the city council, shall be subject to the ordinances relating to paving and repaving, and requiring the company to pay the entire cost of paving and repaving. Thereafter such cost, so far as it relates to streets never before paved, may be made a charge on the abutting owners. *Philadelphia, O'Rourke v. Bowman*, 175 Pa. St. 91, 38 W. N. C. 143, 34 Atl. 353. Where the entire cost and expense of paving, repairing, and repaving "on any street occupied by it" may be assessed against the railroad company, its duty to repair or repave extends to the entire

roadway from curb to curb. *Philadelphia v. Ridge Ave. Pass. Co.*, 22 Atl. 695; *Philadelphia v. Evans*, 139 Pa. St. 483.

The power conferred by statute upon certain cities to compel street railroad companies whenever any street is "ordered paved" to pave and maintain a specified part thereof, relates only to streets paved before occupation by the street railroad company. *Oscaloosa St. R. & L. Co. v. Oscaloosa*, 99 Iowa, 496, 68 N. W. 808. A provision in the charter of a railroad company to the effect that whenever its road is laid and used by running passenger cars thereon the company shall be subject to the ordinance of the city requiring the running of passenger railway cars, does not make the company liable for the cost of street paving. *Philadelphia v. Empire Pass. R. Co.*, 177 Pa. St. 382, 35 Atl. 721. And see *Shamokin v. Shamokin St. R. Co.*, 178 Pa. St. 128, 35 Atl. 862, 39 W. N. C. 136. Macadamizing is not paving within

municipal authorities must determine the necessity for the repaving, the time when and the material with which it shall be done.<sup>20</sup> A street railroad company is not liable to pay for the paving or repaving of a street simply because its rails, ties, and tracks are property within the street and subject to taxation generally; such property is not property benefited within the meaning of the municipal charter providing that the cost, or a part thereof, of any local improvement shall be assessed upon the property benefited thereby.<sup>21</sup> Under its common-law duty to maintain its tracks in a public street so as not to be an obstruction to travel thereon when a new pavement is ordered, a street surface railroad company must relay its tracks and adjust its roadbed to the new pavement and grade.<sup>22</sup> A permit to the company to relay its rails in

the meaning of a requirement that the streets should be "graded and paved." United Rys. & El. Co. of Baltimore v. Hayes (Md.), 48 Atl. 364.

20. Detroit v. Fort Wayne & E. R. Co., 90 Mich. 646, 6 Am. R. & Corp. Rep. 188, 51 N. W. 688, 50 Am. & Eng. R. Cas. 447; Lansing v. Lansing City El. R. Co., 109 Mich. 123, 3 Det. Leg. N. 41, 66 N. W. 949; Philadelphia v. Ridge Ave. Pass. Ry. Co., 22 Atl. 395; Columbus v. Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651; City of Reading v. Union Tract. Co. (Pa. C. P.), 24 Pa. Co. Ct. 629; Village of Mechanicville v. S. & M. St. Ry. Co., 35 Misc. Rep. (N. Y.) 513. An express provision in the charter requiring the company to pay the entire cost of paving and repaving any street where its track is laid, is not limited by a preceding clause that

the company in constructing its road shall conform to the surveys and grades established or thereafter to be established to the time of the first construction. Philadelphia, Nestor v. Spring Garden, etc., Co., 161 Pa. St. 522, 29 Atl. 286.

21. People *ex rel.* Davidson v. Gilon, 126 N. Y. 147, 27 N. E. 282, 37 St. Rep. (N. Y.) 17. In the case cited the provision of the New York charter, under the Consolidation Act of 1882, was construed. The present provision is section 949 of chapter 466 of 1901, and is substantially the same as the former provision.

22. Columbus v. Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651; Western Paving & Supply Co. v. Citizens' St. Ry. Co., 128 Ind. 525, 26 N. E. 188; District of Columbia v. Washington & Georgetown Ry. Co., 1 Mack. 361.

a paved street necessarily includes the taking up of the pavement.<sup>23</sup>

**§ 13. Repairs.**—The right of a street surface railroad company to lay its tracks in the street carries with it the obligation to lay them in a proper manner and keep them in repair; and if an injury occurs by reason of neglect in either of these respects, the defendant is liable in damages. The duty is affirmative and absolute. Notice to the company of the defect is not necessary.<sup>24</sup> Although notice of the defect is presumed, the presumption may be rebutted.<sup>25</sup> Although the right of the company even to that part of the street occupied by its rails is only in common with that of other travelers, yet where its road to be available at all must be exclusive, as for example for unobstructed passage, it is of necessity, for the time being, superior or paramount; hence, its common-law duty to repair.<sup>26</sup> Where it has the right to maintain an electric system for power, it has the right to use

23. North Chicago St. Ry. Co. v. Dudgeon, 104 Ill. 477, 56 N. E. 796.

24. Worster v. Forty-second St., etc., R. Co., 50 N. Y. 203, 205; Call v. Portsmouth, K. & Y. St. Ry. (N. H.), 45 Atl. 405; Maloney v. Railway Co., 173 Mass. 587; N. Y. & N. J. Tel. Co. v. Railroad Co. 51 La. Ann. 299; Simon v. M. St. R. Co., 29 Misc. Rep. (N. Y.) 126, 60 St. Rep. (N. Y.) 251; Citizens' St. R. Co. v. Howard, 102 Tenn. 475, 52 S. W. 864. Where a street railroad company has been licensed without a previous ascertainment in the prescribed manner of compensation for injuries to abutting lands, the licensees, and not the municipality, are liable for the in-

juries resulting from the construction of the railroad. Hatch v. Tacoma, O. & G. H. R. Co., 6 Wash. 1, 32 Pac. 1063; Silsby v. Same, id. 1067; Mahnke v. New Orleans City & L. R. Co. (La.), 29 So. 52; Siacik v. N. Central Ry. Co. (Md.), 48 Atl. 149; Citizens' St. Ry. Co. v. Ballard, 22 Ind. App. 151, 52 N. E. 729. See Galveston City R. Co. v. Nolan, 53 Tex. 139.

25. Casper v. Dry Dock, etc., R. Co., 67 St. Rep. (N. Y.) 805. And see Moss v. Crimmins, 57 App. Div. (N. Y.) 587, 68 St. Rep. (N. Y.) 495.

26. Ehrisman v. E. Harrisburgh R. Co., 4 Am. Electl. Cas. 486, 150 Pa. St. 180.

the usual and ordinary appliances for repairing its wires, for a reasonable time, superior to the right of travelers in the street.<sup>27</sup> In case of its failure to repair however its liability to persons injured by defects which the company should remedy is no higher or greater than that which the law imposes upon the municipality itself; except perhaps as to notice of the defect.<sup>28</sup> Where the franchise or contract provides that the railroad company "shall pave the street in and about the rails in a permanent manner and keep the same in repair," the company is required to have the street in such state as that the ordinary and expected travel of the locality may pass with reasonable ease and safety. A street in a city is not kept in repair if it is founderous or has in it a trench into which carriages may go and harm follow. The duty to keep in repair is to be performed at once on the arising of occasion for repair, or the doing of it put off for a reasonable time, if the nature of the occasion warrants delay. In the latter case, the duty to keep in repair carries with it the duty to guard the public against harm from the repair being delayed. This may be done by placing barriers by day, and barriers and lights by night, about the defective place; or some temporary expedient, sufficient for the time, may be used, such as a bridge over the opening or founderous place. The railroad company is not required, under such a contract, to keep the entire street in repair. The duty applies however to that portion of the street within the two rails of each track and for a space of at least twelve inches

27. *Potter v. Scranton Tract Co.*, 6 Am. Electl. Cas. 95, 176 Pa. St. 271.

28. *Sanford v. Union Ry. Pass. Co.*, 16 Pa. Super. Ct. 393; *Cline v. Crescent City R. Co.*, 43 La.

Ann. 327, 9 So. 122; *Adams v. City of Halifax*, 13 N. S. L. R. (1 Russell & Gelder) 344; *Mechanicsburgh v. Meredith*, 54 Ill. 84. Where the statute authorized a tramway company to enter into a

from the outside of each rail, and certainly so much of the space between the tracks as was disturbed in the original construction of the road.<sup>29</sup> If the railroad company fail to make the repairs, the city, being chargeable therefor, may repair the defects; and if it proceed in the usual way and no fraud is shown nor any facts to impeach the reasonableness of its account for the expense thereof, it may recover the sum actually expended in the work against the railroad company.<sup>30</sup> The railroad company is not liable however for damages resulting from the digging of a trench in the public streets within its tracks by a city or private persons who are bound to repair, but neglected to do so, leaving a depression in the surface of the street.<sup>31</sup> If the company is required to keep the surface of the street for a certain distance outside the rails of its track in good repair, it means for the distance named outside of each outer rail.<sup>32</sup> It is not required to replace a pavement with a new, improved and more expensive style of pavement whenever the city directs, under a provision in its charter that it shall "keep the streets in good

contract with the highway authorities to keep the portion of the street between its tracks in repair, it is not liable for injuries to a person using that portion of the road and suffering from its non-repair. *Alldred v. W. Met. Trams. Co.* (C. A.), (1891) 2 Q. B. 398.

29. *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231, 236; *Memphis P. P. & R. Co. v. State*, 87 Tenn. 746, 11 S. W. 946; *Philadelphia v. Philadelphia City Pass. R. Co.*, 177 Pa. St. 382, 35 Atl. 379, 720; *Groves v. Louisville Ry. Co.*, 58 S. W. 508, 22 Ky. Law Rep. 599. In

the case last cited, it was held that the company could not escape liability by showing that the obstruction was caused by the wearing away or natural sinking of the street from the rails.

30. *Mayor, etc., of N. Y. v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905.

31. *Citizens' Pass. Ry. Co. v. Ketchum*, 122 Pa. St. 228, 15 Atl. 733, 22 W. N. C. 419.

32. *People v. Fort St., etc., R. Co.*, 41 Mich. 413, 2 N. W. 188; *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231, 236; *Joyce v. Halifax St. R. Co.*, 24 N. S. 113.

repair."<sup>33</sup> Where the company is required to so lay and maintain its rails that vehicles can freely cross at any point, it must fill up the surface of the streets along the outside of the rails where it wears or wastes away, and is not a trespasser in so doing.<sup>34</sup> Where a city ordinance provides for the repavement of a certain street without any reference to other streets intersecting the same whereon street railroad tracks are laid, the city cannot recover from the company operating such tracks for repairing done at the intersections.<sup>35</sup>

**§ 14. Repair of bridges.**—A bridge is not a part of a street, nor does the term "pave" apply to the reflooring of a bridge within an ordinance requiring it to pave the space between the rails on any street being paved, particularly where bridges are named several times as distinct from streets, avenues, and

33. *Philadelphia v. Hestonville, M. & F. Pass. R. Co.*, 177 Pa. St. 371, 35 Atl. 718. In the case cited it was also held that the charter provision that the company shall be subject to such ordinances as the city council shall adopt in regard to paving, repairing, and grading the streets, and to prevent obstructions thereon, does not require it to pave, repair, or grade the streets, but simply that it shall not obstruct the city in improving the streets. Provisions of street railway charters that the company shall keep the streets occupied in good order or repair, or shall keep in constant repair that portion of the street which they use and occupy, have been held to require the company to keep in repair the whole width of the street, and not

merely the portion between the tracks. *Philadelphia v. Thirteenth, etc., St. Pass. R. Co.*, 169 Pa. St. 269, 36 W. N. C. 428, 33 Atl. 126. Where the franchise is upon condition that the company keep the surface of the street inside its rails and six inches outside its tracks in good repair, the company must repair such streets within the municipality as it is authorized to construct and operate by an act imposing no such duty. *Duluth v. Duluth St. R. Co.*, 60 Minn. 178, 62 N. W. 262; *Norristown v. M. St. Pass. R. Co.*, 1 Pa. Adv. Rep. 460, 23 Atl. 1060.

34. *Baumgartner v. Mankato*, 60 Minn. 244, 62 N. W. 127.

35. *Philadelphia v. Philadelphia City Pass. Ry. Co.*, 177 Pa. St. 379, 35 Atl. 720.

highways.<sup>36</sup> And where a street railroad must cross one of the canals of the State over which it has no right to build a bridge, it may cross a bridge already built by the State, with the permission of the State authorities, without thereby making the bridge a part of its appliances, for a latent defect in which it must be held responsible if discoverable in the process of manufacture.<sup>37</sup> But if the charter of the company required it to repair such portion of all bridges in the city as are occupied by its tracks, and its tracks are laid upon a bridge built over a canal and an injury is occasioned to a third person by want of repairs upon the portion of the bridge between the tracks, so that the city making the said repairs had recovered against the canal proprietor therefor, the latter, it was held in Massachusetts, might recover the amount of the judgment against the railroad company, including the cost of defending against the city's action, providing the action was defended at the request of the company, or for its benefit, after notice to come in and defend.<sup>38</sup> If by contract with the city the company is bound to maintain the bridges within a municipality upon which its tracks are laid in good repair, the duty may be enforced by mandamus.<sup>39</sup>

**§ 15. Liability of company for neglect to repair; how enforced.—** A street surface railroad company is not discharged from its duty to the public to keep its roadbed in repair by the omission of the city to impose such obligation in the franchise granted to the company, and it is liable directly to any

36. Cedar Rapids v. Cedar Rapids, etc., R. Co., 108 Iowa, 406, 79 N. W. 125.

37. Birmingham v. Rochester City & Brighton R. Co., 137 N. Y. 13, 32 N. E. 995, 49 St. Rep. (N.

Y.) 888, revg. 45 id. 724, 18 N. Y. Supp. 649.

38. Proprietor of Locks v. Lowell H. R. Co., 109 Mass. 221.

39. State *ex rel.* New Orleans v. Canal & Claiborne St. R. Co., 44 La. Ann. 526, 10 So. 940.

person injured by reason of a defect arising from its negligence.<sup>40</sup> Where the duty of keeping in repair and repaving a street is imposed by statute or by ordinance, city councils may, after notice to the railroad company upon whom the duty devolves, cause the street to be closed, the cars stopped, and the street repaved at the expense of such company, and the latter will not be entitled to set off injury to its business by the stopping of the cars.<sup>41</sup> If the company is under contract with the city that in case of a change of grade its road shall be changed to conform to such grade or improvement upon notice from the borough engineer, at its expense, it is liable to pay the expense of lowering its whole track, where upon notice to make its road correspond with the change of grade it merely lowers its rails, leaving the remainder of its track in the same position that it was before.<sup>42</sup> If by reason of the company's neglect and the city's liability also to keep the street in repair, recovery is had against the city for an injury occasioned by such neglect, the latter may recover from the company the amount of the judgment so obtained against it.<sup>43</sup> And in the absence of proof of fraud, recklessness, or extravagance the city, making repairs itself which the company should make, may recover the sum actually expended for the work.<sup>44</sup> It is not every defect within or near its tracks in the public street for which the railroad com-

40. Laredo El. & Ry. Co. v. Hamilton (Tex. Civ. App.), 56 S. W. 998; Citizens' St. Ry. Co. v. Ballard, 22 Ind. App. 151, 1 Rep. 565, 52 N. E. 729; Ober v. Crescent City R. Co., 44 La. Ann. 1059, 52 Am. & Eng. R. Cas. 576, 11 So. 818; Bradwell v. Pittsburgh & W. E. Pass. R. Co., 153 Pa. St. 105, 25 Atl. 623.

41. Philadelphia v. Thirteenth, etc., R. Co., 3 Pa. Dist. 468, 15 Pa. Co. Ct. 291.

42. McKeesport v. McKeesport Pass. R. Co., 158 Pa. St. 447, 27 Atl. 1006.

43. Brooklyn v. Brooklyn City Ry. Co., 47 N. Y. 475.

44. Mayor, etc. v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905.

pany is liable; for illustration, if a switch be placed in a cross-walk of the street in a proper manner, level with the grade of the crosswalk and with its flange below the surface of the crosswalk, which crosswalk the city, and not the company, was bound to keep in repair, the company is not liable for an injury from a defect occasioned by a subsidence or wearing away of a portion of the crosswalk leaving the switch properly located, and thus causing an obstruction.<sup>45</sup> The company cannot avoid liability to answer to the city or to a party injured for any damages occasioned by reason of the company's breach of its contract or duty to keep the street in repair by leasing its road to another company and parting with the possession and control of its line.<sup>46</sup> But a provision in the statute that companies incorporated thereunder shall keep the portion of the street between and for a stated distance outside of the rails in permanent repair, and that upon their failure to do so it may be done by the State at their expense, does not apply to a company chartered thereunder which is operating a street railroad line as the lessee of another company chartered under a general railroad law imposing no such obligation, even though the lessee may have relaid tracks in streets in different positions, or laid down an additional track.<sup>47</sup> A municipality, in the performance of its duty to maintain the highways in a condition safe for public travel, may take out cross-rods which project from the track of a street surface railroad company and prevent the proper paving of the street; and the company is not enti-

45. *Lowery v. Brooklyn City & N. R. Co.*, 76 N. Y. 28.

(N. Y.), 279, 54 St. Rep. (N. Y.) 526, 24 N. Y. Supp. 1016.

46. *Fort Worth St. R. Co. v. Allen* (Tex. Civ. App.), 39 S. W. 125, 1 Am. Neg. Rep. 529; *Durfee v. Johnstown, etc., R. Co.*, 71 Hun

47. *Gilmore v. Utica*, 131 N. Y. 26, 42 St. Rep. (N. Y.) 501, 29 N. E. 841.

tled to a preliminary injunction restraining the city from interfering with the restoration of such rods, merely because the company apprehends that without them its tracks may be spread in the spring time and traffic may be interfered with, or become dangerous.<sup>48</sup> For a failure to keep its roadbed in repair so that the usefulness of the street shall not be impaired in any manner and so that traffic across or along the road shall not be obstructed, a street railroad company may be indicted.<sup>49</sup> Its duty to repair may also be enforced by mandamus.<sup>50</sup> If however there be an adequate legal remedy to enforce the duty to repair, the writ of mandamus will not issue.<sup>51</sup> The company is not liable to adjoining owners for damages occasioned by cutting down its roadbed and grading it to the established grade under permission of the city, if the grading is done in a good and workmanlike manner and confined wholly within the street.<sup>52</sup>

**§ 16. Lessee's or transferee's liability.**—Where a lease of a city railroad is duly authorized by law, the lessee only is liable for the negligence in its operation.<sup>53</sup> But in the ab-

48. Schuylkill Tract. Co. v. Shenandoah, 23 Pa. Co. Ct. 222, 9 Pa. Dist. 77.

49. Memphis, P., P. & P. R. Co. v. State, 87 Tenn. 746, 11 S. W. 946; St. Louis v. Mo. Ry. Co., 87 Mo. 151.

50. State v. Paterson, etc., R. Co., 43 N. J. L. 505; State *ex rel.* v. New Orleans City Pass. Ry. Co., 42 La. Ann. 550, 7 So. 606; State *ex rel.* v. Jacksonville St. R. Co., 10 So. 590; State *ex rel.* v. St. Paul, etc., R. Co., 35 Minn. 131; 28 N. W. 3.

51. State *ex rel.* v. New Orleans, etc., R. Co., 42 La. Ann. 138, 7 So. 226.

52. Inter-State Consol. R. T. Co. v. Early (Kan.), 26 Pac. 422; Pratt v. Home St. R. Co., 49 Mo. App. 63.

53. Pinkerton v. Pa. Tract. Co., 193 Pa. St. 229, 44 Atl. 284; Stelk v. McNulta, 99 Fed. 138, 44 C. C. A. 357; Hunting v. Hartford St. Ry. Co., 73 Conn. 179, 46 Atl. 424; Mendoza v. Met. St. Ry. Co., 51 App. Div. (N. Y.) 430, 64 St. Rep. (N. Y.) 745; Reidman v.

sence of a statutory provision therefor the lessor company cannot exempt itself from liability to the public by the mere contract of letting.<sup>54</sup>

Brooklyn, etc., R. Co., 28 App. Div. (N. Y.) 540, 51 N. Y. Supp. (85 St. Rep.) 196.

54. Hanlan v. Phila. & W. C. Turnpike Co., 122 Pa. St. 115, 40 W. N. C. 520, 37 Atl. 943, 28 Pittsb. L. J. (N. S.) 97. And see § 15.

Where the lease is authorized by statute, the lessor takes by neces-

sary implication the benefit of a provision in the charter to the lessor that it shall be required to keep in repair only so much of the street as is within its tracks. Philadelphia v. Philadelphia City Pass. Ry. Co., 177 Pa. St. 379, 35 Atl. 720; Mullen v. Phila. Tract. Co., 20 W. N. C. 203.

## CHAPTER V.

### **Operation; and herein of the Company's Rights and Duties in Relation to Individuals Other than Passengers and Employees.**

- SECTION I.** Measure of care required generally.  
 2. Contractors and lessees.  
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 19. Frightening animals.  
 20. Collision with steam train.  
 21. Collision with other car.  
 22. Collision with animals, or other vehicles.  
 23. Collision with persons on or near tracks.  
 24. Collision with workmen upon street.

### **Contributory Negligence.**

25. Measure of care required generally.  
 26. Rule to stop, look, and listen.  
 27. Pedestrians.  
 28. Children.  
 29. Infirm persons.  
 30. Bicyclist.  
 31. Avoidable injury notwithstanding contributive negligence.  
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### **Pleading and Practice.**

33. Pleading.  
 34. Burden of proof.  
 35. Some recent rulings on evidence in actions for personal injuries resulting from collision with street cars.

## SECTION 36. Questions for jury.

37. Instructions to jury.
38. Damages.

§ 1. **Measure of care required generally.**—It is not the only duty of the street surface railroad company to construct its road properly. It must also maintain it suitably and operate it carefully. The introduction of new forms of vehicles and of new motive power in street railroads has not impaired the right of foot and other passengers to safe passage at street crossings; and indeed at other places along the street. In operating their cars the street railroad companies have a common right in the highway with other travelers, and in the absence of any law or municipal ordinance regulating the speed of their cars they must run at such speed and must be kept in such control as not to interfere unreasonably with the rights of others upon the highway.<sup>1</sup> The care required of railroad companies is commensurate with the danger. Where the wires carry a highly dangerous current of electricity the utmost degree of care in the construction, inspection, and repair of the wires, so as to keep them harmless at places where persons are liable to come in contact with them, is required.<sup>2</sup> Adopting a propelling power increasing the

1. Lawler v. Hartford St. R. Co., 72 Conn. 74, 43 Atl. 545; Gilmore v. Federal St. & P. V. Pass. R. Co., 153 Pa. St. 31, 31 W. N. C. 507, 23 Pittsb. L. J. (N. S.) 438, 25 Atl. 651; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276, 35 Ohio L. J. 140; Goldrick v. Union R. Co., 20 R. I. 128, 37 Atl. 635, 2 Am. Neg. Rep. 647.

2. Perham v. Portland Gen. El. Co., 33 Oreg. 451, 53 Pac. 14, 40 L. R. A. 799. In the case cited it

was held that the owner of such wires is chargeable with negligence in stringing them over a bridge so near the top of it that it is impossible to make repairs on the bridge without coming in contact with them. Macon v. Paducah St. Ry. Co. (Ky.), 7 Am. Electl. Cas. 630, 62 S. W. 496. Held, error to instruct the jury that ordinary negligence is the want of such care "as is commonly exercised by persons of ordinarily prudent habits placed

hazard of persons in the rightful use of the street, the street railroad company is bound to exercise a degree of care

under like circumstances, and that gross negligence is either an intentional wrong or such a reckless disregard of security and the right as to imply bad faith." *Id.* Such companies, maintaining poles and electric wires in the public streets of a city, are bound to know the dangers that may naturally be caused by such use of the streets, and to guard against the same by the exercise of all the foresight and caution which can be reasonably expected of ordinary men under such circumstances. *Denver v. Sherret* (C. C. App. 8th C.), 88 Fed. 226, 60 U. S. App. 104, 31 C. C. A. 499, 2 Denver Leg. Adv. 153. But the duty does not extend to the making of such examination of them as will be effectual to discover decay which may have taken place so as to render the poles unsafe. *Id.*; *Western Union Tel. Co. v. State*, Nelson, 6 Am. Electl. Cas. 210, 82 Md. 293, 31 L. R. A. 572, 32 Atl. 763. And see *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 26 L. R. A. 810; *City El. St. R. Co. v. Conery*, 61 Ark. 381, 31 L. R. A. 570, 3 Am. & Eng. R. Cas. (N. S.) 365, 33 S. W. 420; *Giraudi v. Improvement Co.*, 107 Cal. 120, 28 L. R. A. 596; *Siek v. Toledo Consol. St. R. Co.*, 16 Ohio C. C. 393, 9 O. C. D. 51. The degree of care required in operating an electric car in a public street is proportionate to the increased danger arising from the use of electricity. *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281,

52 Pac. 92, 40 L. R. A. 172, 10 Am. & Eng. R. Cas. (N. S.) 563; *Dougherty v. Mo. Ry. Co.*, 97 Mo. 647, 8 S. W. 900, 15 West. Rep. 235; *Penny v. Rochester R. Co.*, 7 App. Div. (N. Y.) 595, 74 St. Rep. (N. Y.) 732, 40 N. Y. Supp. 172.

"The degree of care in the management of its cars, exacted of a street railroad company using electricity as a motive power, and traversing the streets of a populous city, where danger to pedestrians is to be constantly guarded against, is not less than that required of the company to its passengers." 7 App. Div. (N. Y.) 602; *National Tel. Co. v. Baker*, 2 Ch. 186, 68 L. T. Rep. (N. S.) 283, 47 Alb. L. J. 411; *Larson v. Central R. Co.*, 56 Ill. App. 263; *Godfrey v. Streator R. Co.*, 50 id. 378.

A boy twelve years old came in contact with a live wire which hung from one of the posts used to support defendant's wires reaching nearly to the ground in a street, and was severely injured by an electric current. It was held that persons using electricity for lighting, propelling cars, or other business, must exercise the highest degree of care for the protection of all persons in all places where such persons have a right to be. And upon testimony that plaintiff seized the wire after being warned of the danger, it was further held, that whether or not this was a fact, and if it were, the question of contributory negligence was for the jury to determine. *Macon v. Pa-*

proportionate to the increase of the danger.<sup>3</sup> But it is not bound to adopt every improvement and to use every precaution for the purpose of meeting an unforeseen occurrence and preventing injuries to travelers upon the streets. The degree of care it must exercise depends upon the hazards and dangers which it may reasonably expect to encounter and upon the consequences which may be expected to flow from its negligence. Railroad companies whose cars are drawn by steam, at a high rate of speed, are held to the greatest skill, care, and diligence in the manufacture of their cars and engines, and in the management of their roads, because of the great danger from their hazardous mode of conveyance to human life in case of any negligence. But the same degree of care and skill is not required from carriers of passengers by stage coaches; and, for the same reason, is not required of carriers of passengers upon street cars drawn by horses. The degree of care required in any case must have reference to the subject-matter, and must be such only as a man of ordinary prudence and capacity may be expected to exercise in the same circumstances. In some cases this rule will require the highest degree of care, and in others much less.<sup>4</sup> Great care is required of a cable car company and a horse car company in the operation of their lines where they are run parallel and within a few feet of each other.<sup>5</sup> In fact, there is no fixed standard in the law by which the

ducah St. Ry. Co., 7 Am. Electl. Cas. 630; 62 S. W. 496.

3. Hall v. Ogden City R. Co., 13 Utah, 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. (N. S.) 77.

4. Unger v. Forty-second St., etc., R. Co., 51 N. Y. 497, 501; Steierle v. Union Ry. Co., 156 N. Y. 685, 70, 50 N. E. 834, 419;

Koehne v. N. Y. & Queens Co. Ry. Co., 165 N. Y. 603; McKeown v. Cincinnati St. R. Co., 2 Ohio Leg. N. 388; Buente v. Pittsb., etc., Co., 2 Super. Ct. (Pa.) 185.

5. West Chicago St. R. Co. v. Yund, 68 Ill. App. 609; affd., 169 Ill. 47, 48 N. E. 208.

court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to know the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.<sup>6</sup> But a presumption of negligence arises from certain occurrences, as where the trolley

6. Per Mr. Justice LAMAR, in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485, 489, citing *New Jersey R., etc., Co. v. Pollard*, 89 U. S. (22 Wall.) 341, 22 L. Ed. 877; *Thompson v. Flint & P. M. R. Co.*, 57 Mich. 300; *Gaynor v. Old Colony & N. R.*, 100 Mass. 208, 212; *Marietta & C. R. Co. v. Pixley*, 24 Ohio St. 654; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60; *Robinson v. Cone*, 22 Vt. 213; *Jamison v. San Jose & S. C. R. Co.*, 55 Cal. 593. And

see *Gardner v. Mich. Cent. R. Co.*, 150 U. S. 361, 37 L. Ed. 1110, 14 Sup. Ct. Rep. 144; *M'Leod v. Chicago, etc., Ry. Co.*, 104 Iowa (73 N. W.) 139; *Pollard v. Maine, etc., R. Co.*, 87 Me. 61, 32 Atl. 739; *O'Melia v. Kansas City, etc., Ry. Co.*, 115 Mo. 221, 21 S. W. 507; *Hall v. Ogden City Ry. Co.*, 6 Am. Electl. Cas. 598, 603, 13 Utah, 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. (N. S.) 77; *Stelk v. McNulta* (U. S. C. C. A. Ill.), 99 Fed. 138, 40 C. C. A. 357.

wire falls into the street and thereby some one is injured.<sup>7</sup> Such care however cannot be required of the company in the operating of its cars as would absolutely prevent accident.<sup>8</sup> But it must furnish reasonably skilled and competent men to operate its cars and well-built cars with suitable appliances; and it is held to greater caution in the more thronged streets of the densely populated portions of a city than in the suburban streets;<sup>9</sup> and on a public road than on a private way.<sup>10</sup>

It is immaterial whether the accident was occasioned by the unusual speed of the car or other carelessness in management, or in consequence of a defect in the pavement, where the company is obliged to keep the pavement in repair.<sup>11</sup> To entitle one to recover for injuries occasioned in collision with a street car, some negligence must be shown on the part of the defendant which directly contributed to the injury complained of.<sup>12</sup> It owes the same affirmative duty of rea-

7. O'Flaherty v. Nassau El. R. Co., 7 Am. Electl. Cas. 535, 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. (88 St. Rep.) 96; affd., 59 N. E. 1128, 165 N. Y. 624. Or a span-wire used to support the trolley wire breaks. Jones v. Union R. Co., 18 App. Div. (N. Y.) 268, 46 N. Y. Supp. (80 St. Rep.) 321; Clark v. Nassau El. R. Co., 9 App. Div. (N. Y.) 51, 41 N. Y. Supp. 78.

8. West Chicago St. R. Co. v. Wizemann, 83 Ill. App. 402.

9. Todd v. Second Ave. Tract. Co., 192 Pa. St. 587, 44 Atl. 337, 44 W. N. C. 523; Brown v. Wilmington City Ry. Co. (Super Ct.), 1 Penn. (Del.) 332, 40 Atl. 936, 12 Am. & Eng. R. Cas. (N. S.) 439.

10. Cooper v. Staten Isl. Mid-

land R. Co., 32 Misc. Rep. (N. Y.) 721, 66 N. Y. Supp. 308.

11. Kraut v. Frankford, etc., R. Co., 160 Pa. St. 327, 28 Atl. 783, 34 W. N. C. 116, 49 Alb. L. J. 425; Mahnke v. New Orleans City & L. R. Co. (La.), 29 So. 52. In the case last cited the injury was occasioned by stepping into a hole in the street between the tracks after leaving the car, where the hole had been in existence and visible for a week, and the crossing was liable to have holes in it from extraneous causes.

12. Siacik v. Northern Central Ry. Co. (Md.), 48 Atl. 149; Jones v. Third Ave. R. Co., 68 St. Rep. (N. Y.) 832; Snider v. New Orleans & C. R. Co., 48 La. Ann. 1, 18 So. 695.

sonable vigilance and care to a licensee on its tracks as to a person there on business.<sup>13</sup> The number of cars that the street railroad shall operate rests in the discretion of its directors, subject however to review by the courts. But it may be compelled by mandamus to operate its road although it cannot get labor at the price or on the conditions it offers.<sup>14</sup> If the road be operated by cable, in which a system of signaling to the central house to stop the engine in case of accident is used, a conduit may be constructed by the company in its roadbed.<sup>15</sup> In the absence of authority for that purpose, the president of the company cannot contract with a third person to suspend the operation of the company's cars, and for the cutting or elevation of its wires, so that such party may move a large building upon and along its tracks in order to cross the same.<sup>16</sup>

**§ 2. Contractors and lessees.**—In the absence of express legislative permission, a street railroad company cannot absolve itself from liability for damages inflicted by the negligent operation of the road by leasing it. Both lessor and lessee are liable for the negligence of the transferee.<sup>17</sup> If

13. *Wells v. Brooklyn Heights R. Co.*, 34 Misc. Rep. (N. Y.) 44, 68 N. Y. Supp. (102 St. Rep.) 305.

14. *Matter of Loader*, 14 Misc. Rep. (N. Y.) 208, 35 N. Y. Supp. 996, 70 St. Rep. (N. Y.) 571.

15. *Empire City Subway Co. v. Broadway, etc.*, R. Co., 87 Hun (N. Y.), 279, 33 N. Y. Supp. 1055, 67 St. Rep. (N. Y.) 741.

16. *Millville Traction Co. v. Goodwin*, 5 Am. Electl. Cas. 23, 53 N. J. Eq. (8 Dick.) 448, 32 Atl. 263.

17. *Ricketts v. Birmingham St.*

R. Co.

13. *Wells v. Brooklyn Heights R. Co.*, 85 Ala. 600, 5 So. 353. It is immaterial that a portion of a street car line operated in cities and towns is upon land owned by the railroad company so long as it constitutes a part of the road authorized by the municipality. *Fort Worth St. R. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 29 S. W. 61; *Durfee v. Johnstown, G. & K. H. R. Co.*, 71 Hun (N. Y.), 279, 54 St. Rep. (N. Y.) 526, 24 N. Y. Supp. 1016; *Railroad Co. v. Hambleton*, 40 Ohio St. 496, 14 Am. & Eng. R. Cas. 126; *Abbott v.*

the defect was occasioned by the lessor company prior to the lease, the lessee cannot be liable.<sup>18</sup> The railroad company is liable although the injury occurred while the railroad was being operated by a construction company under its contract to operate the road satisfactorily for a period of time before delivering it to the street railroad company.<sup>19</sup> Where however the lease of a street railroad is duly authorized by law, the lessee only is liable for its negligence in operating the road.<sup>20</sup> Where an independent contractor makes improvements on the tracks of a street railway company under a contract to do that specific thing for a certain sum of money, the company is not liable for the negligence of the contractor's servants.<sup>21</sup>

**§ 3. Roadbed and tracks.**—Travelers on a street have a right to use the railroad tracks laid along the street under authority from the city, and are not trespassers in so doing; hence, if one is injured through the railroad company's neglect to keep its road and tracks running along the street in a good condition, as by falling on a loose rail or protruding spike, the company is liable.<sup>22</sup> If it cut down the grade of the

Johnstown, etc., H. R. Co., 80 N. Y. 28; Braslin v. Somerville H. R. Co., 145 Mass. 64, 32 Am. & Eng. R. Cas. 406.

18. So held where the lessor left an obstruction, in laying its tracks through a city street, upon which the plaintiff fell and was injured, and subsequently leased its road to another corporation. Higgins v. Brooklyn, Q. C. & S. R. Co., 54 App. Div. (N. Y.) 69, 66 St. Rep. (N. Y.) 334.

19. Cogswell v. West St. & N. S. El. R. Co., 5 Wash. 46, 52 Am.

& Eng. R. Cas. 500, 7 Am. R. & Corp. Rep. 48, 31 Pac. 411; Chattanooga R. & C. R. Co. v. Liddell, 85 Ga. 482, 11 S. E. 853, 8 Ry. & Corp. L. J. 296.

20. Pinkerton v. Pa. Tract. Co., 193 Pa. St. 229, 44 Atl. 284.

21. Hauser v. Met. St. R. Co., 27 Misc. Rep. (N. Y.) 538, 58 N. Y. Supp. 286.

22. Cline v. Crescent City R. Co., 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 So. 122; Wiley v. Smith, 25 App. Div. (N. Y.) 351, 40 N. Y. Supp. (83 St. Rep.) 934; Doyle v.

street by the width of its track two feet, throwing the dirt from the excavation upon the street upon either side of the track, or throw up an embankment of snow, and allow it to remain there several days and injury is occasioned thereby, it is liable.<sup>23</sup> It must however have notice of such defect, or the conditions must be such that it ought to have noticed it.<sup>24</sup>

New York, 58 App. Div. (N. Y.) 588, 69 N. Y. Supp. (103 St. Rep.) 120; Kelley v. Met. St. Ry. Co., 25 Misc. Rep. (N. Y.) 194, 54 N. Y. Supp. (88 St. Rep.) 123.

23. Greeley v. Federal Street & Pleasant Valley Pass. Ry. Co., 4 Am. Electl. Cas. 492, 153 Pa. St. 218. It is not negligent for a street railroad company to lay its track in a trench below the existing grade pursuant to the direction of the township supervisors made in view of a contemplated lowering of the grade. Miller v. Lebanon & H. A. St. Ry. Co., 126 Pa. St. 190, 42 W. N. C. 274, 40 Atl. 413; Somerville v. City R. of Poughkeepsie, 43 St. Rep. (N. Y.) 425, 17 N. Y. Supp. 719; Friedman v. D. D., E. B. & B. R. Co., 33 St. Rep. (N. Y.) 649, 11 N. Y. Supp. 427; Newport News & O. P. Ry. & El. Co. v. Bradford, 3 Va. Sup. Ct. 15, 37 S. E. 807. As to the care of street car companies in the removal of snow, see McDonald v. Railroad Co., 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 104; Ovington v. Railroad Co., 163 Mass. 440, 40 N. E. 767; Markowitz v. D. D., etc., R. Co., 12 Misc. Rep. (N. Y.) 412, 67 St. Rep. (N. Y.) 572, 33 N. Y. Supp. 702; Bowen v. Railroad Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822, 19 Am. & Eng. R. Cas. 131; Wallace v. Railroad Co., 58

Mich. 231, 24 N. W. 870; Mahoney v. Met. R. Co., 104 Mass. 73; Lee v. Union R. Co., 12 R. I. 383. If by putting salt on a switch the snow is melted and caused to cover the switch from sight and plaintiff's sleigh was overturned thereby to his injury, the jury may find the railroad company negligent. Wooley v. Grand St., etc., R. Co., 83 N. Y. 121; Laughlin v. Railroad Co., 62 Mich. 220, 28 N. W. 873; Smith v. Railroad Co., 69 N. H. 504, 44 Atl. 133; Dixon v. Railroad Co., 100 N. Y. 170, 3 N. E. 65. If the snow storm is an extraordinary one, the defendant is not bound to make extraordinary exertions not to create obstructions at street corners. Electric Co. v. Bradford, *supra*. No common-law duty rests upon a railroad company to keep the space within the street between its tracks free from ice and snow; and in the absence of public regulations to the contrary, it is not liable for their presence to a person who slips and falls thereon. Silberstein v. Houston, etc., Ry. Co., 117 N. Y. 293, 27 St. Rep. (N. Y.) 330, 22 N. E. 951.

24. Kelley v. Met St. Ry. Co., 25 Misc. Rep. (N. Y.) 194, 54 N. Y. Supp. (88 St. Rep.) 173; Simon v. Met. St. Ry. Co., 29 Misc. Rep. (N. Y.) 126, 60 N. Y. Supp. 251.

While it is its duty to know if the track is out of order and to exercise active diligence in repairing any defect, still the liability is based upon negligence, and the burden of proof is upon the plaintiff to show negligence by which he was injured. So where the street is in constant use by heavy vehicles which could loosen the rail and there is no evidence that until the plaintiff had stepped upon the rail (which he claimed was loose and thus caused his injury) it had become loose and that it was not loosened by the vehicles that passed over it immediately before the plaintiff was injured, he cannot recover.<sup>25</sup> He can recover however if it be shown that the rail was loose and in a dangerous condition for at least a week before the accident.<sup>26</sup> A street railroad company confronted by one of the canals of the State, over which it has

In the case last cited it was held that the defense that the defendant was not using the tracks at the time of the injury was not available. And see *Maloney v. Natick & C. St. R. Co.*, 173 Mass. 587, 54 N. E. 349; *Gumper v. Waterbury Tract. Co.*, 68 Conn. 424, 36 Atl. 806; *Casper v. D. D., etc., R. Co.*, 23 App. Div. (N. Y.) 451, 48 N. Y. Supp. (82 St. Rep.) 352; on appeal from retrial, 56 App. Div. (N. Y.) 372, 67 St. Rep. (N. Y.) 805.

25. *Casper Case*, 56 App. Div. (N. Y.), *supra*. And see *Moss v. Crimmins*, 57 App. Div. (N. Y.) 587, 68 N. Y. Supp. 495. A house was claimed to be injured by the bumping of railroad cars over a switch eighty feet away. While it appeared that cracks opened up in the thirteen-inch brick wall of the building, it did not appear that the walls were out of plumb, or that mortar came loose. *Held*, that

neither negligence nor nuisance was shown. *Starr v. North St. Tract. Co.*, 193 Pa. St. 536, 44 Atl. 556. And see *Hogan v. Railroad Co.*, 150 Mo. 36; *Isaackson v. Railway Co.*, 75 Minn. 27; *Wallbridge v. Railway Co.*, 190 Pa. St. 274; *Sanders v. Railway Co.*, 147 Mo. 411.

26. *Schnell v. Met. St. R. Co.*, 50 App. Div. (N. Y.) 616, 64 N. Y. Supp. (98 St. Rep.) 67; *Higgins v. Brooklyn, Q. C. & S. R. Co.*, 54 App. Div. (N. Y.) 69, 66 N. Y. Supp. 334. And see *Donavan v. Transit Co.*, 102 Cal. 245, 36 Pac. 516; *Cowan v. Railroad Co.*, 84 Mich. 583, 48 N. W. 166; *Zanger v. Railroad Co.*, 87 Mich. 646, 49 N. W. 879; *Thomas v. Traction Co.*, 62 N. J. L. 36, 42 Atl. 1061; *Lane v. City of Syracuse*, 12 App. Div. (N. Y.) 118, 42 N. Y. Supp. 219.

no right to build a bridge, may cross a bridge thereover with the permission of the State authorities, without becoming liable for a latent defect in the bridge, as if it were a part of the roadbed for which the company was responsible.<sup>27</sup> In New York, center-bearing rails in municipal streets are prohibited.<sup>28</sup>

**§ 4. Cars and appliances.**— The amount of care which should be required of an electric street railroad in maintaining its cars is that which would be suggested to careful, cautious, prudent persons skilled in that business, by the facts and circumstances surrounding their use. Its duty to equip its cars with safety appliances is not limited by the convenience of the company, but includes the adoption of such as men of average prudence would use under the same circumstances.<sup>29</sup> Although an appliance is furnished and put up by a manufacturer of high reputation, and is the best and strongest device known at the time for keeping trolley wires in place, yet if it break and injure a traveler upon the street, although the

27. Birmingham v. R., C. & B. R. Co., 137 N. Y. 13, 32 N. E. 995.

28. The statute is as follows:

"§ 109. **Center-bearing rails prohibited.**— No street surface railroad corporation shall hereafter lay down in the streets of any incorporated city or village of this state what are known as 'center-bearing' rails; but in all cases, whether in laying new track or in replacing old rails, shall lay down 'grooved' or some other kind of rail not 'center-bearing' approved by the local authorities. Such grooved or other rail shall be of such shape and so laid as to permit the paving stones to come in close contact with the projec-

tion which serves to guide the flange to the car wheel. Where in any city, the duty of repairing and repaving streets, as distinguished from the authorization of such paving, repairing and repaving, is by law vested in any local authority other than the common council of such city, such other local authority shall be the local authority referred to in this section. (As amended by chap. 676 of 1892.)" 3 Heydecker's Gen'l Laws, 2d ed., p. 3323.

29. Warren v. Manchester St. Ry. Co. (N. H.), 47 Atl. 735; Dallas, etc., Ry. Co. v. Randolph (Tex. Civ. App.), 5 Am. Electl. Cas. 379.

break is a clean one, bright in color and appearance, and the iron sound all through with no fault or defect in it, yet from the mere fact of the injury, the jury may find the railroad company using it negligent.<sup>30</sup> It is not quite an accurate statement of the law that if the appliance used were not the best which skill and science had contrived and which were in practical use, the company is negligent. It may be chargeable with negligence to one injured from a failure to introduce improvements in its apparatus which have been tested and found materially to contribute to the safety of passengers, and which it is reasonably practical to adopt.<sup>31</sup> But there must be evidence in the case that there are other, different, and superior appliances in use with which the defendant could have equipped its car, and which would have tended to insure greater safety.<sup>32</sup> If the appliance were known to the company to be defective, although it were the best in use, the

30. *Uggla v. West End St. Ry. Co.*, 4 Am. Electl. Cas. 389, 160 Mass. 351.

31. *Roberts v. Spokane St. Ry. Co.*, 23 Wash. 325, 63 Pac. 506. The use of an electric car with brakes so defective that they do not work well, and with a motor so defective that the motorman received a shock which delayed him while trying to stop the car to avoid an accident, constitutes negligence. *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281, 52 Pac. 92, 40 L. R. A. 172, 10 Am. & Eng. R. Cas. (N. S.) 563. Of course, to justify a recovery it must appear that the accident could have been avoided if the appliance had been in good condition. *Gannon v. New Orleans City & L. R.*

Co.

Co., 48 La. Ann. 1002, 20 So. 223; *Little Rock Traction & El. Co. v. Morrison* (Ark.), 62 S. W. 1045; *Smith v. N. Y. & Harlem R. Co.*, 19 N. Y. 127; *Dintruff v. Rochester City & B. R. Co.*, 32 St. Rep. (N. Y.) 730, 10 N. Y. Supp. 402; affd., 124 N. Y. 647, 27 N. E. 412. In the case last cited it appeared that the company had neglected a usual precaution, one which was a matter of common knowledge to those familiar with the operation of horse cars, to neutralize the power of the front brakes in case of the mischievous interference with the rear handle by boys.

32. *Wynn v. Central Park, etc.*, Co., 10 App. Div. (N. Y.) 13, 41 N. Y. Supp. 595, 75 St. Rep. (N. Y.) 987.

company is liable for an injury occasioned from its use.<sup>33</sup> It is also liable for any carelessness in its use, as where its employees engaged in stringing feed wires allowed a wire to lie in the bed of a gutter on a public street for a distance of thirty feet or more and then raised it suddenly to a height of about twenty feet without giving notice to passers-by of such intended action; thereby causing the injury.<sup>34</sup> The question of the right of the company to operate its cars by other power than that specified in its charter or franchise can only be raised by the government with whom its contract was made, and is not subject to collateral attack in a private action to recover for injuries. So where the corporation was given authority to operate street cars by animal power and actually operated them by an underground cable, in excess of its powers, it was held not to be liable for a collision unless negligence were shown.<sup>35</sup> In actions

33. Musser v. Lancaster, etc., R. Co., 176 Pa. St. 621, 35 Atl. 206, 39 W. N. C. 37, 13 Lanc. Rev. 369.

34. Devine v. Brooklyn Heights Ry. Co., 6 Am. Electl. Cas. 318, 1 App. Div. (N. Y.) 237.

35. Chicago Gen. Ry. Co. v. Chicago City Ry. Co., 186 Ill. 219, 57 N. E. 822, affg. 87 Ill. App. 17; Wilmington City Ry. Co. v. Railway Co., 46 Atl. 12; Potter v. Scranton Traction Co., 6 Am. Electl. Cas. 95, 176 Pa. St. 271. But see H. R. T. Co. v. W. T. & R. Co., 135 N. Y. 393, 402, to the contrary; in the prevailing opinion it is stated: "We cannot assent to the argument of the learned counsel for the defendant that the determination of this question is immaterial, because the State alone, by its attorney-general, can

bring suit for a usurpation of corporate powers, or because, ordinarily, the local authorities must prosecute for an unlawful obstruction of the streets, not involving the appropriation of private property. In the case of a corporation, exercising a delegated authority for the public benefit, the actionable quality of a private injury resulting therefrom may depend upon the legislative will, and the aggrieved party may be without remedy if the damage sustained is the result of the proper exercise of a power or privilege conferred by law, and a right of action is not given by express enactment. This immunity from liability does not, however, extend to acts which are *ultra vires*, or which are equivalent to a confiscation or condemna-

for negligence against a street railroad company, as against any other corporation or person, the rule is that where the facts are as consistent with due care on the part of the defendant as with want of it no recovery can be had.<sup>36</sup>

**§ 5. Fenders and other guards.**—Until there was such general use of fenders upon street railway cars as to make them a common appliance for the safety of travelers upon the street, a company would not be liable for failure to use them.<sup>37</sup> Nor is it negligence in itself for an electric car not to have a headlight after nightfall where colored signal lights in front and rear, required by city ordinance, are carried.<sup>38</sup> And, although the city ordinance require all cars to be provided with the "most improved modern pilot or safety guard," and the requirement is not complied with, it cannot be invoked in favor of one whose child is run over and killed by one of such cars. The ordinance imposes a higher duty than the law requires.<sup>39</sup> If fenders are attached to both ends of a street car, intended however to project only from the front

tion of the property rights of the citizen, unless provision is made for due compensation. If the sovereign power has never granted to the defendant the right to make use of electricity in the traction of its cars in the streets of Albany, it must respond to the plaintiff and to all others whose lawful pursuits are invaded by its illegal procedure."

36. Claflin v. Meyer, 75 N. Y. 260; Baulec v. N. Y., etc., R. Co., 59 id. 356; French v. Buffalo, etc., R. Co., 2 Abb. Ct. App. Dec. (N. Y.) 196. So held where it appeared that plaintiff tripped while crossing a city street upon a coil

of wire and was caught up and dragged along the street by one of defendant's cars. McCaffrey v. Twenty-third St. R. Co., 47 Hun (N. Y.), 404.

37. Mullen v. Springfield St. R. Co., 6 Am. Electl. Cas. 492, 164 Mass. 450, 41 N. E. 664; Hogan v. Citizens' St. R. Co., 150 Mo. 36, 51 S. W. 473; West Chicago St. R. Co. v. Sullivan, 165 Ill. 302, 46 N. E. 234, affg. 64 Ill. App. 628.

38. McGee v. Consolidated St. R. Co., 5 Am. Electl. Cas. 462, 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300.

39. Buenta v. Pittsb., A. & M. Tract. Co., 2 Super. Ct. (Pa.) 185.

end, and the rear one becomes disarranged without the knowledge of defendant's employees, and thereby an injury is occasioned, the company is not liable.<sup>40</sup> When the road-bed is elevated above or depressed below the grade of other parts of the street for any purpose, or when any obstruction to travel is necessarily and temporarily placed in the street by the railroad company, it should take reasonable care in guarding its track and preventing injury. It is for the jury to determine in the case whether the provision made for the safety of the traveler was a reasonable one.<sup>41</sup> If the ordinance of a municipality requiring street cars operated by electricity to be equipped with fenders, also provides that the fender to be used must first be approved by the common council, the street railroad company is not bound, as matter of law, to have fenders upon their cars immediately after the approval by the common council; they are only bound to exercise reasonable diligence in obtaining the approved fenders and equipping the cars with them.<sup>41½</sup>

40. *Gargan v. West End St. Ry. Co.*, 176 Mass. 106, 57 N. E. 217, 49 L. R. A. 421. It has been held in Ohio that where there is no allegation of negligence in failing to lower the life-guard, the admission of evidence tending to show that the life-guard with which the car was equipped was not lowered was error. *Cleveland, P. & E. R. Co. v. Nixon*, 21 Ohio C. C. 736, 12 O. C. D. 79.

41. *Fox v. Wm. Horton, Jr., & Co.* (N. J. Sup.), 45 Atl. 793; *Little Rock Traction & El. Co. v. Dunlap*, 68 Ark. 291, 57 S. W. 938.

41½. *Platt v. Albany Ry.*, 170 N. Y. 115. The ordinance passed October 7, 1895, required every car

operated by electricity and run upon a track to be provided with a fender, and also commanded that "no railroad operated by electricity shall use any fender or fenders, guard or guards, until the same shall have been approved by the common council, which said approval shall be filed with the clerk of the common council, and the use of such fender or fenders, guard or guards, shall be deemed a compliance with this provision." On the 25th November, 1896, the defendant applied to have a fender selected by it approved. Its application was referred to the committee on railroads, which reported thereon on the 17th May, 1897, in

**§ 6. Care of its electric wires.**— Electricity being a motive power which common experience has taught is dangerous to life even when the utmost skill and prudence of best-trained electricians are exercised, electric street railway companies are bound to use extraordinary care in its management, and are liable for slight negligence. It is a subtle, imponderable, death-dealing element or fluid; of its nature or the laws governing it very little is known, even among those few most advanced in the study of it; hence, in its use the utmost caution must be exercised.<sup>42</sup> An electric

favor of granting the application. The report was then adopted, and the day after the defendant ordered the fender, but the first lot was not received until the 16th June, 1897, after the accident happened by which plaintiff's intestate was killed; and an element of defendant's negligence was claimed to be the absence of the fender approved by the common council. The court charged that the company had a reasonable time to place fenders upon their cars after the approval of the common council, and left it to the jury to determine whether or not reasonable diligence after such approval had been used to provide the fenders. The defendant had requested a charge that "the defendant was not bound to have a fender on the car at the time of the accident." The request was denied, and charge made as above, and it was held error. The court of review said: "The court not only omitted to comply with the request, but went further and charged that the jury might find whether the defendant had used reasonable diligence in equip-

ping its cars with fenders after the fender selected had been approved by the common council, although during the short interval that elapsed between the approval and the accident, the railroad company had done everything which, so far as it appears, it could have done to procure fenders. This also was reversible error, for it cast a burden upon the defendant which the law did not require it to bear. The law required reasonable diligence, but the charge, so far as the evidence permits us to see, required an impossibility." Id.

42. Denver Tramway Co. v. Reid, 4 Am. Electl. Cas. 332, 339, 4 Colo. Ct. App. 53; Kankakee El. Ry. Co. v. Whitemore, 4 Am. Electl. Cas. 362, 45 Ill. App. 484; Mahoney v. San Francisco, etc., Ry. Co., 6 Am. Electl. Cas. 457, 110 Cal. 471; Cogswell v. West St., etc., Ry. Co., 4 Am. Electl. Cas. 412, 5 Wash. 46; Perham v. The Portland El. Co., 7 Am. Electl. Cas. 487, 33 Oreg. 451.

Escape of electricity from a street railway to the injury of a horse being driven on a public

street railway company must maintain its wires so that they will not come in contact with one using the street. Nevertheless, one who leaves the street and climbs a pole supporting wires, without permission from or notice to the company whose system he has thus entered upon, and is injured by reason of the contact of one company's wire with the feed wire of another company, can recover from neither.<sup>43</sup> And

street is presumptive proof of negligence in the operation of the railroad. *Trenton Pass. Ry. Co. v. Cooper*, 7 Am. Electl. Cas. 444, 60 N. J. L. 219; *Jones v. Union Ry. Co.*, 7 Am. Electl. Cas. 447, 18 App. Div. (N. Y.) 267.

Where an accident occurred from contact with an electric wire, and an action was brought therefor, it was held that evidence of defective insulation for several weeks, as shown by the wires "spitting fire" should have been received; that a person going lawfully where electric wires are, while bound to know generally the danger, has, unless the defective insulation could have been seen with diligence, the right to presume that they are properly insulated. *Will v. Edison El. Ill. Co.* (Pa. Sup.), 7 Am. Electl. Cas. 642.

43. *Augusta Ry. Co. v. Andrews*, 4 Am. Electl. Cas. 378, 89 Ga. 653; *Freeman v. Brooklyn Heights R. Co.*, 54 App. Div. (N. Y.) 506, 66 N. Y. Supp. 1052. In the case last cited it appeared that the injury was occasioned to a boy who had climbed upon a girder of an arch bridge, along which the defendant's trolley wire was strung, and had caught hold of a guard wire which in some manner had become

charged with electricity. The court said: "The real question is, whether the defendant owed the plaintiff any active duty under the circumstances. It is claimed by the plaintiff that it was customary for the boys in the neighborhood of this bridge to walk over the girders, but in view of the fact that it would be necessary to climb to get upon them, that a perfectly safe sidewalk had been constructed for the accommodation of persons on foot, and that the way over the girders was not unobstructed, was the duty imposed upon this defendant, in the exercise of reasonable care, to anticipate that its wires, even if charged with electricity, would be dangerous? They were entirely out of the reach of persons using the street and sidewalk in the ordinary and orderly manner, and it was only when the plaintiff had gone out of his way and had climbed into a position of danger, independently of the wires, that he was exposed to contact with them. We are of the opinion that the defendant was not bound to anticipate this danger, and especially so as the guard wire was not designed for the purpose of carrying a current of electricity, but was for the purpose of protect-

if the usual, ordinary, and safe method of insulating the wire is used to protect the public from injury and the insulation was intact up to the time that one receiving an injury therefrom takes hold of the wire, he cannot recover for the injury.<sup>44</sup>

ing the wire which did carry the current, and the usual precautions, by way of inspection, had been taken, to see that there was no leakage of the current from the wire to the guard wire." (Pages 598, 599.)

In a recent case in Oregon it appeared that an electric light company had, by permission, strung its wires across the top of a bridge belonging to a railroad company and the wires were apparently, but not actually, perfectly insulated and were not placed so that servants of the railroad company could not come in contact with them, and the electric light company had not informed the railroad company that it was dangerous to touch the wires. *Held*, that the electric light company was liable for the death of an employee of the railroad company who was repairing the bridge, and in ignorance of the danger of his act on account of the apparent perfect insulation, touched two wires at once and was instantly killed. *Perham v. The Portland El. Co.*, 7 Am. Electl. Cas. 487, 33 Oreg. 451.

Plaintiff, walking in a street and thrown down twice about the time and place where defendant's trolley wire, broken, had fallen, is entitled to have the jury say whether her fall was occasioned by shock from the wire. It was also held that testimony that the company in the construction of its trolley

wire and the supports for the same used the best material in the market and that in common use, and examined them once in every four days and examined the wire which broke and its supports the day before the accident, does not necessarily overcome the presumption of negligence; first, because it came from interested witnesses, employees of the company charged with the duty of inspection, whom the jury were not bound to believe; and second, because there was evidence to warrant the finding that the device employed by the company, called the brake-system, designed to throw the current off the wire the moment it came in contact with the ground, was either not properly adjusted or was not in proper working order. *O'Flaherty v. Nassau El. R. Co.*, 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. (88 St. Rep.) 96; affd., 59 N. E. 1128, 165 N. Y. 624, 7 Am. Electl. Cas. 535.

44. *Tri-City Ry. Co. v. Killeen*, 92 Ill. App. 57. And see *Gross v. South Chicago City R. Co.*, 73 Ill. App. 217, 30 Chic. Leg. N. 186. In the case cited it appeared that the person injured was riding for his own convenience on the top of a box car on a railroad crossing the line of a street railroad maintaining a trolley wire at a height high enough to admit of the passage of persons standing on ordinary cars or of a person sitting on a high car. But the company is

His ignorance of the danger attending contact with an electric wire in no way excuses his fault in failing to exercise care in approaching the same.<sup>45</sup> Railroad commissioners have no arbitrary power to require electric street railroad wires to be suspended at any particular number of feet above the road-bed of a steam railroad crossed by such wires, unless it appears that a less height is insufficient to prevent danger to the steam road's employees; and where the latter cut the wires, when it causes great loss to the street railroad company and great danger to human life, the steam railroad company is a trespasser, *ab initio*, and liable for all damages sustained by the street railroad company.<sup>46</sup>

**§ 7. In relation to telephone or other light current wires.—**  
The law under which telephone and telegraph companies are organized grants them no co-ordinate rights with travelers upon the public highway, but assigns them to a secondary and subordinate position. They are allowed to construct their lines along and upon the public roads and streets; provided however they do not interfere with public travel thereon. The primary and dominant purpose of a street, as has been seen, is for public passage; and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use unless the contrary intent is clearly expressed. Therefore, such a company has no right of action against an electric street railroad company subsequently constructing and operating its road upon the

negligent where it so places one of its guy wires over the track of a steam railroad as not to afford sufficient space for the latter's trains to easily and conveniently pass without danger to its servants and employees. Earslow v. New Or-

leans & N. E. R. Co., 49 La. Ann. 86, 21 So. 153.

45. Danville Street Car Co. v. Watkins, 97 Va. 713, 34 S. E. 884.

46. Saginaw Union St. R. Co. v. Michigan C. R. Co., 91 Mich. 657, 52 N. W. 49.

same highways because of special injuries sustained by the derangement of the electric current upon its lines of wire by means of induction. The inconvenience or loss which it may suffer from the adoption of a mode of locomotion authorized by law, carefully and successfully employed, and which does not destroy or impair the usefulness of a street as a public highway, is not sufficient cause for a recovery unless there is some statute which makes it actionable.<sup>47</sup> The

47. H. R. T. Co. v. W. T. & R. Co., 4 Am. Electl. Cas. 275, 135 N. Y. 393, 407, 17 L. R. A. 675, 48 St. Rep. (N. Y.) 417, 32 N. E. 148, 31 Am. St. Rep. 838, 6 Am. R. & Corp. Rep. 619. The court said: "It seems to be indispensable to the successful prosecution of the plaintiff's business, that it should make use of an exceedingly weak and sensitive current of electricity. By a law of electric force, not clearly defined or understood, the transmission of a powerful current, such as the defendant must use to supply motion to its cars, along a line of wire parallel with and in close proximity to the plaintiff's wires, induces upon the latter an additional current which renders the operation of the plaintiff's telephones at all times difficult, and sometimes impracticable. It is found that this disturbance cannot be avoided by the defendant without a complete change of the system adopted, and the use of motors which are more expensive, more dangerous and less useful and efficient. \* \* \* To render their respective appliances available, both parties must have a return electric current and both use

the earth for that purpose. \* \* \* The defendant allows the electric current used for the movement of its cars to escape or discharge, at least in part, directly from the wires into the ground, from whence it spreads or flows, by reason of the conductivity of the earth, upon plaintiff's grounded wires, and the most serious loss which the plaintiff sustains results from this cause, which is scientifically known as conduction. \* \* \* It (the plaintiff) has accorded to the public, by the manner in which it has elected to use its franchise, the unrestricted right of passage, and it cannot question the form in which such right shall be enjoyed so long as it is of lawful origin and is utilized with proper care and skill. The defendant's mode of conveyance of passengers is of this character, and the plaintiff can no more justly complain of its loss from this source than it could if, by the jarring of loaded vehicles passing up and down Broadway, its delicate and sensitive instruments were displaced and their beneficial use impaired or destroyed." (Pages 408-412.)

And see Bell Tel. Co. v. Montreal St. R. Co. (Can.), Rap. Jud.

very nature of an electric railroad operated on the single trolley plan requires the trolley wire to be a certain distance from the rails, and to be under all other wires crossing the line of the railroad. Therefore, the wires of telegraph and telephone companies must be placed at such height as not to interfere with the trolley wire. An electric, passenger railroad company is bound to use reasonable care and prudence in placing its wires and poles, and to adopt all ordinary and usual appliances and methods to prevent contact between its trolley and feed wires and the wires of a telephone company stretched along or across the same highway. And it is the duty of the telephone or telegraph company using the public highway for its poles and wires to so construct and maintain its line as not to incommodate the public use of the highway for purposes of travel and transportation, whether by ordinary vehicles, horses, railways, or electric passenger railways, lawfully used on the same. Hence, if there be danger of actual contact of the wires of the two companies, the telephone or telegraph company must stretch their wires upon higher poles, or, by insulation, prevent the contact, notwithstanding its prior occupancy of the street.<sup>48</sup>

Quebec, 6 Br. 223; Cincinnati Inc. Plane R. Co. v. City, etc., Telegraph Assn., 48 Ohio St. 390, 12 L. R. A. 534, 46 Am. & Eng. R. Cas. 588, 26 Ohio L. J. 8, 27 N. E. 890, 10 Ry. & Corp. L. J. 82, 44 Alb. L. J. 86; Cumberland Telegraph & Telephone Co. v. United El. R. Co., 93 Tenn. 492, 29 S. W. 104, 10 Am. R. & Corp. Rep. 549, 27 L. R. A. 236; National Tel. Co. v. Baker, 68 Law Times Rep. 683, 2 Ch. 186, 47 Alb. L. J. 411. If an injury is due solely to the negligence of

the employees of the street railroad company, the telephone company is not liable because it was occasioned by one of its wires which had become heavily charged with electricity in consequence of its breaking and falling upon a trolley wire erected after the telephone wires were placed. Morgan v. Bell Tel. Co. (Can.), Rap. Jud. Quebec, 11 C. S. 103.

48. Central, etc., Supply Co. v. Wilkesbarre, etc., Ry. Co., 4 Am. Electl. Cas. 260, 11 Pa. Co. Ct. 417.

Therefore, an electric street railroad company is not required to exercise the utmost degree of care and diligence to keep a feed wire placed several feet above the heads of travelers insulated so as to prevent the communication of electricity to a lineman of a telephone company who draws the telephone wire over the upper side of such feed wire.<sup>49</sup> And where the telephone company rents the use of the street railroad company's poles and assumes all risk for damages to its employees, an employee of the telephone company injured while repairing a leak caused by the railroad company's guard wire settling so as to come in contact with the trolley wire whenever a car passed beneath (it not appearing that the telephone company had the right to repair the railroad company's wires), cannot recover against the railroad company.<sup>50</sup> The municipality may provide by ordinance how the various electric wires within its public streets shall be protected; and if the ordinance require guard wires for electric wires "wherever it shall be necessary to cross" other electric wires, it applies to crossing wires already erected, since it provides a remedy for an existing evil; and the electric railroad company using strong currents of electricity on wires which are not insulated, which directly cross electric wires which are insulated, may be compelled to place guard wires where they will prevent the contact of the telephone and railway wires in case of the breaking of poles or the falling of wires on account of storms, or otherwise.<sup>51</sup> And

49. Calumet El. St. R. Co. v. Grosse, 70 Ill. App. 381.

50. Sias v. Lowell, L. & H. St. Ry. Co. (Mass.), 60 N. E. 974.

51. State, Wisconsin Tel. Co. v. Janesville St. R. Co., 87 Wis. 72, 9 Am. R. & Corp. Rep. 319, 41 Am. St. Rep. 23, 22 L. R. A. 759, 57 N. W. 970. And see Rowe v. N. Y. & N. J. Tel. Co. (N. J.), 48 Atl. 523; Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 27 L. R. A. 365, 61 N. W. 1101, 46 Am. St. Rep. 849, 11 Am. R. & Corp. Rep. 540, 1 Am. & Eng. R. Cas. (N. S.) 329.

it may be stated generally that even without an ordinance prescribing it, the railroad company in constructing its road and erecting its wires in a street in which a telephone company has its wires is bound to use guard wires or other known and recognized reasonable precautions and appliances, if the result can be so attained, which will prevent contact between its wires and those of the telephone company and consequent injury to the latter therefrom.<sup>52</sup> A telephone company and an electric railroad company may, and at the request of the municipal authorities should, use the same poles when such use is not necessarily attended with increased danger.<sup>53</sup> A telephone lineman has the right to assume that an electric railroad company has used suitable and safe appliances to prevent the escape of electricity from its line of trolley wires to the guy wires; but such right does not excuse him from exercising proper care to prevent injury when he knows as a fact that the wires are not safe.<sup>54</sup>

52. Central Pa. Tel. & S. Co. v. Wilkes-Barre, etc., R. Co. (Pa. C. C.), 6 Kulp (Pa.), 383, 11 Pa. Co. Ct. 417, 1 Pa. Dist. 628. Where death was occasioned by the breaking of an electric wire, the negligence claimed was that the wire was originally strung on poles at a distance of 160 feet apart and was not at all secured by intermediate fastenings, so as to be taut enough to prevent vibrations and frequent rubbings with the guy wire, the contact with which caused the severance of the wire by heat and its fall, it was held that the question of the defendant's negligence was for the jury. Gordon v. Ashley (N. Y. Sup.), 34 Misc. Rep. (N. Y.) 743, 70 N. Y. Supp. 1038.

53. Bergen v. So. New England Tel. Co., 70 Conn. 54, 39 L. R. A. 192, 38 Atl. 888.

54. Bergen Case, *supra*; Newark El. Light & Power Co. v. Gardner (C. C. App. 3d C.), 78 Fed. 74, 39 U. S. App. 416, 23 C. C. A. 649; Cumberland Tel. & Tel. Co. v. United El. R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236, 10 Am. R. & Corp. Rep. 549. In a recent case it appeared that a lineman of the telephone company was sent to ascertain the extent and nature of trouble with telephone wires, caused by a charge of electricity transmitted from the wires of an electric railway company; he voluntarily ascended the railway company's pole and was killed by contact with the charged

It may be stated generally that the escape of electricity from wires suspended over streets through any other wires that may come in contact with them must be prevented, so far as it can be done, by the exercise of reasonable care and diligence. The care must be commensurate with the great danger that exists, although the owners of the wires are not insurers against accident.<sup>55</sup> When a telephone company and an electric railroad company both maintain their wires with knowledge of the danger caused by the want of guard wires between the trolley wire and the telephone wire insecurely suspended over it, they are jointly liable for negligence.<sup>56</sup>

wire; had he ascended the telephone company's pole, thirty feet distant, he could have avoided contact with the wires of the railroad company. In the action against both companies for his death, the court instructed the jury as follows: "If the deceased had no knowledge, either actual or from information, that the span wires of the street railroad company at the point in controversy and strung to this pole were not properly insulated and reasonably safe, then he had a right to presume they were properly and safely insulated, unless the want of insulation at all or defective insulation was so open and obvious that he ought in the exercise of ordinary and reasonable care and caution to have so known."

The charge was held erroneous because it relieved the employee of the duty to exercise active diligence for his own safety in an occupation peculiarly hazardous, and where the employee had the better opportunity of discovering and avoiding the danger. It appeared

that the lineman was also an inspector, and that the telephone company had entered into a contract with the railway company to the effect that either company might use the poles of the other in case of necessity or expediency. It was also held that whether the magnetic bell and test set furnished to a lineman by the telephone company were useful only in discovering electrical disturbances on the line and were not designed to test the insulators and defects therein or their location, was a question for the jury. Jackson & S. St. R. Co. v. Simmon (Sup. Ct. Tenn.), 23 Am. & Eng. R. Cas. (N. S.) 236, 64 S. W. 705.

55. City El. St. R. Co. v. Conery, 6 Am. Electl. Cas. 217, 61 Ark. 381, 31 L. R. A. 570, 3 Am. & Eng. R. Cas. (N. S.) 365, 33 S. W. 426; Uggla v. West End R. Co., 160 Mass. 351.

56. McKay v. So. Bell Tel. & Teleg. Co., 111 Ala. 337, 31 L. R. A. 589, 19 So. 695, 3 Am. & Eng. R. Cas. (N. S.) 605. It appeared in the case cited that a broken

The railroad company is charged with the duty of observing at least ordinary diligence, not only to prevent the contact, but also to discover and prevent its continuance, even when occasioned by the negligence of others, including that corporation whose employees are thus exposed to danger.<sup>57</sup> The violation of a city ordinance imposing a penalty on dangerous driving cannot preclude a recovery against a telephone company for damages because of injury to the horse from contact with a wire suspended in the street, without proof that such driving contributed to the injury. The driver has the right to assume that the street was free from any dangerous obstruction.<sup>58</sup> The provision of the Ohio Act (83 Ohio L. 143) forbidding the use of uninsulated wires, does not affect the use of wires in city streets for conducting electricity to operate street railroad cars.<sup>59</sup>

**§ 8. Lookout and signals.**— It is the duty of motormen, gripmen, and drivers operating street railroad cars in crowded city streets to be on the lookout, to employ all

telephone wire was permitted to remain suspended across the trolley wire. And see United E. Ry. Co. v. Shelton, 3 Am. Electl. Cas. 477, 89 Tenn. 423, 46 Am. & Eng. R. Cas. 206, 14 S. W. 863; Block v. Milwaukee St. Ry. Co., 5 Am. Electl. Cas. 293, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365; Krattz v. Brush El. Light Co., 82 Mich. 457, 46 N. W. 787; West. Union Tel. Co. v. Thorne, 28 U. S. App. 123; Huber v. La Crosse City R. Co., 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583.

57. Atlanta Consol. St. R. Co. v. Owings, 97 Ga. 663, 33 L. R. A.

798, 5 Am. & Eng. R. Cas. (N. S.) 1, 25 S. E. 377. A telephone company is not, as matter of law, negligent in failing to remove a rusted wire which was liable to break and come in contact with a highly charged trolley wire, where it has no knowledge of its condition. Hand v. Central Pa. Tel. & S. Co. (C. P.), 1 Lack. Leg. N. 351.

58. Hovey v. Mich. Tel. Co., 124 Mich. 607, 7 Det. Leg. N. 353, 83 N. W. 600; Jones v. Finch (Ala.), 29 So. 182.

59. Simmons v. Toledo, 5 Ohio C. C. 124.

reasonable means to avoid accidents, and to respect the equal rights of others to the use of the public streets.<sup>60</sup> On approaching a street crossing, even with usual and ordinary speed, a warning should be given.<sup>61</sup> Before running forward at such a speed that he will be likely to strike a team driving along beside the track, he should give a warning signal, unless he has good reason to believe the occupants of the

60. West Chicago St. R. Co. v. Williams, 87 Ill. App. 548; Swain v. Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829; Wells v. Brooklyn City R. Co., 58 Hun (N. Y.), 389, 34 St. Rep. (N. Y.) 632, 12 N. Y. Supp. 67; Chicago Gen. Ry. Co. v. Kriz, 94 Ill. App. 277.

61. Owensboro City R. Co. v. Hill (Ky.), 56 S. W. 21; Hall v. Ogden City St. R. Co., 13 Utah, 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. (N. S.) 77; Driscoll v. Market St. Cable R. Co., 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591; Mitchell v. Tacoma R. & M. Co., 9 Wash. 120; Fandel v. Third Ave. R. Co., 15 App. Div. (N. Y.) 426, 44 N. Y. Supp. 462; Mitchell v. Third Ave. R. Co., 62 App. Div. (N. Y.) 371, 70 N. Y. Supp. 1118; Dennis v. North Jersey St. Ry. Co. (N. J. Sup.), 45 Atl. 807; Traction Co. v. Scott, 58 N. J. L. 682, 34 Atl. 1094, 33 L. R. A. 122; Traction Co. v. Chenowith, 61 N. J. L. 554, 35 Atl. 1068, 5 Am. & Eng. R. Cas. (N. S.) 599. In the case of Mitchell v. Third Ave., etc., Co., *supra*, it appeared that the car was going very fast, the motorman looking toward the rear, and that he did not ring any bell and the headlight was dim at the time of the accident.

The defendant's negligence is fairly a question for the jury where it appears that at the time of the accident the motorman was engaged in conversation with some one inside the car, and the speed of the car was constantly increased up to within a short distance of the point where the accident occurred. Killeen v. Brooklyn Heights R. Co., 48 App. Div. (N. Y.) 557, 62 N. Y. Supp. 927. And see Goldstein v. D. D., etc., R. Co., 35 Misc. Rep. (N. Y.) 200, 71 N. Y. Supp. 477; Watson v. Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742. The sounding of a gong for a considerable distance on the approach of a motor car to a street crossing is a sufficient warning to travelers in the absence of a statute requiring other or different signals. Van Patten v. Schenectady St. R. Co., 80 Hun (N. Y.), 494, 62 St. Rep. (N. Y.) 378, 30 N. Y. Supp. 501.

In the Driscoll Case, *supra*, it was held that the company was not relieved from liability for injuries occasioned by failure to ring the gong by the fact that the city ordinance required the person immediately in charge of the car, and not the company, to give the warning.

wagon are aware of the approach of the car.<sup>62</sup> He should look ahead, not only on his track to see that the way is clear, but on each side of the track to see that no one is about to get on it, and that there are no conditions or circumstances that would evidently compel persons then in his view passing along the street to go upon the track in front of the car.<sup>63</sup> He is not however, *per se*, guilty of negligence in momentarily looking to the sidewalk to see whether persons standing thereon desire to get upon the car.<sup>64</sup> But he is not excused for failure to keep a lookout upon approaching the intersection of two streets in a very busy part of the city by

62. Tashjian v. Worcester Consol. St. Ry. Co., 177 Mass. 75, 58 N. E. 281; Murphy v. Derby St. Ry. Co., 73 Conn. 249, 47 Atl. 120.

63. Macon & I. S. El. St. R. Co. v. Holmes, 103 Ga. 655, 30 S. E. 563, 4 Am. Neg. Rep. 251, 12 Am. & Eng. R. Cas. (N. S.) 385; Conway v. New Orleans City & L. R. Co., 51 La. Ann. 146, 24 So. 780, 5 Am. Neg. Rep. 354; Baird v. Citizens' R. Co., 146 Mo. 265, 48 S. W. 78; City R. Co. v. Thompson, 28 Tex. Civ. App. 16, 47 S. W. 1038; San Antonio St. R. Co. v. Renken, 15 Tex. Civ. App. 229, 38 S. W. 829; Ehrman v. Nassau El. R. Co., 23 App. Div. (N. Y.) 21, 48 N. Y. Supp. 379; Martin v. Third Ave. R. Co., 27 App. Div. (N. Y.) 52, 50 N. Y. Supp. 284; Nugent v. Met. St. R. Co., 17 App. Div. (N. Y.) 582, 45 N. Y. Supp. 596; Calumet E. St. R. Co. v. Lewis, 168 Ill. 249, 48 N. E. 153; Barnes v. Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782; Kestner v. Pittsb. & B. Traction Co., 158 Pa. St. 422, 27 Atl. 1048; Dallas Rapid Transit R. Co. v.

Elliott, 7 Tex. Civ. App. 216, 26 S. W. 455; Hart v. Cedar Rapids & M. C. Ry. Co. (Iowa), 80 N. W. 662; Consolidated Traction Co. v. Haight, 59 N. J. L. (30 Vroom) 577, 37 Atl. 135; Warren v. Union Ry. Co., 46 App. Div. (N. Y.) 517. In the case last cited it appeared that the plaintiff was driving a wagon, the back and sides of which were inclosed, along a public highway, in the center of which defendant maintained its track, and in consequence of each side of the street being out of repair, the wheel of plaintiff's wagon was only about a foot from the track, and the wagon was overturned by a trolley car approaching rapidly and without warning from the rear.

64. Johnson v. Reading City Pass. R. Co., 160 Pa. St. 647, 28 Atl. 100, 34 W. N. C. 203, 40 Am. St. Rep. 752. Or, when his attention is momentarily diverted to an important and essential duty requisite to the safety of the passengers. Culbertson v. Met. St. R. Co., 140 Mo. 35, 36 S. W. 834.

the fact that his attention is diverted in trying to identify another car which he was passing to determine whether it was the car to which he should change.<sup>65</sup> The absence of any municipal ordinance requiring the ringing of a bell or the sounding of a gong or other signal by the operators of a street railroad line at street crossings, or elsewhere, does not relieve the company from liability for personal injury sustained because the one managing the power of the car had negligently failed to give a signal upon observing the person injured in a dangerous position.<sup>66</sup> Approaching a crossing where he has reason to suppose children may be engaged in coasting or other play, he must keep watch and sound warnings for such children, although their conduct is unlawful.<sup>67</sup> But street railroad companies are not compelled to ring a bell from one end of a route to another, and one injured in the middle of a block cannot recover for the injury, merely because of the absence of warning of the approaching car.<sup>68</sup>

65. Thoresen v. La Crosse City R. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. Rep. 64. Nor because he was engaged in making change for a passenger. Barnes v. Shreveport R. Co., 47 La. Ann. 1218, 17 So. 782.

66. Mitchell v. Tacoma R. & M. Co., 9 Wash. 120, 37 Pac. 341.

67. Strutzel v. St. Paul City R. Co., 47 Minn. 543, 50 N. W. 690, 11 Ry. & Corp. L. J. 132.

68. Kuhnen v. Union Ry. Co., 10 App. Div. (N. Y.) 195; De Ioia v. Met. St. R. Co., 37 App. Div. (N. Y.) 455, 56 N. Y. Supp. 22. It is not negligence for a motorman to fail to sound his gong or give other warning upon approaching a pile of lumber lying longitudinally at the side of and close

to the track, between two intersecting cross-streets, preventing the motorman from seeing one at the end of the pile, or such a one from seeing the car, so as to render the company liable for injuries to a child, *non sui juris*, who was playing at the end of the pile and suddenly ran immediately in front of or against the car, where there is no evidence that children were in the habit of playing at that particular point, or any other circumstance to put the motorman on notice. Perry v. Macon Consol. St. R. Co., 101 Ga. 400, 29 S. E. 304, 10 Am. & Eng. R. Cas. (N. S.) 819. And see Miller v. Union Traction Co., 198 Pa. St. 659, 48 Atl. 864; Lawson v. Met. St. R. Co., 40 App. Div. (N. Y.)

Being alert and having his car well in hand so as to be able to stop the car at once, the motorman or gripman is not bound to infer the existence of danger from the approach of a vehicle upon the other track; and the company is not liable for an injury occasioned by the sudden turning of a truck loaded with lumber upon an adjoining track, so that the ends of the lumber were thrust through a car window.<sup>69</sup> Failure of the employees in charge of a street car to keep a proper lookout does not render the company liable for an injury to a person on the track, himself guilty of contributory negligence.<sup>70</sup> Where a driver sees a street car approaching, actionable negligence cannot be predicated on a failure to ring the gong.<sup>71</sup>

307, 57 N. Y. Supp. 997; affd., 166 N. Y. 589, 59 N. E. 1124.

69. Alexander v. Rochester City & B. R. Co., 128 N. Y. 13, 38 St. Rep. (N. Y.) 254, 27 N. E. 950; Elwood v. Chicago City Ry. Co., 90 Ill. App. 397; McFarland v. Third Ave. R. Co., 29 Misc. Rep. (N. Y.) 121, 60 N. Y. Supp. 273.

70. Hot Springs R. Co. v. Johnson, 64 Ark. 420, 42 S. W. 833. In a recent case in New York the trial court charged the jury that the plaintiff, who had been driving on the track of the defendant in front of an approaching car, "had the right to assume that they would give him timely warning of its approach — the motorman."

On review, the court said: "This is not the law. While it was the duty of the motorman to give timely warning if he saw the wagon, or, if he might in the exercise of reasonable care, have seen the wagon in time to have given such warning, he was not bound to do so under all circumstances; and

it was for the jury to determine, under all the circumstances of this case, whether the motorman had discharged his duty, and whether the plaintiff had been free from contributory negligence. The defendant did not have the absolute right to the use of the tracks; the plaintiff might lawfully drive upon them; but the defendant did have the paramount right, and the plaintiff could not drive upon the tracks of the defendant and impose upon it the absolute duty of giving timely warning of the approach of the car." Devine v. Brooklyn Heights R. Co., 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 626.

71. Anderson v. Met. St. R. Co., 30 Misc. Rep. (N. Y.) 104, 61 N. Y. Supp. 899; Williamson v. Met. St. Ry. Co., 29 Misc. Rep. (N. Y.) 324, 60 N. Y. Supp. 477. In Donnelly v. Brooklyn City R. Co., 109 N. Y. 16, it appeared that the plaintiff knew of the approaching train; and it was held that the

The one controlling the power and movement of the car may presume, for example, that one driving a carriage in front of his approaching car and who apparently is about to turn upon the track in front of the car, will desist from so doing when he sounds the gong; he is only bound, as an ordinarily careful man, to exercise efforts to stop his car after he sees that his warning is unheeded.<sup>72</sup> Since a street car runs with greater rapidity and momentum than a wagon or an omnibus, greater caution should be taken to avoid collision. It ought to be lighted in the nighttime so that its approach can be seen by other travelers; and between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision, or else give, by some signal, warning of its approach.<sup>73</sup> The

dimness of the headlight or the failure to blow the whistle or to ring a bell, under the circumstances of that particular case, did not constitute negligence on the part of the defendant. And see Little v. Street Ry. Co., 87 Mich. 205, 44 N. W. 137.

72. Cauley v. La Crosse City R. Co., 106 Wis. 239, 82 N. W. 197. And see Stelk v. McNulta, 40 C. C. A. 357, and note thereto; Hart v. Railway Co., 109 Iowa, 631.

73. Rascher v. East Detroit, etc., Ry. Co., 4 Am. Electl. Cas. 473, 90 Mich. 413, 30 Am. St. Rep. 447, 51 N. W. 463; Vitelli v. Nassau El. R. Co., 53 App. Div. (N. Y.) 639, 65 N. Y. Supp. 1027; Kaechele v. Traction Co., 15 Pa. Super. Ct. 73; Dunican v. Union Ry. Co., 39 App. Div. (N. Y.) 497, 57 N. Y. Supp. 326, 6 Am. Neg. Rep. 155. In the case last cited it was held that if the driver of a street car approaching a

private crossing has reason to believe that persons are in the habit of coming upon the highway at the time when he is approaching, he is bound to use the same care toward those persons that he would be bound to use with regard to other persons crossing the street at any regular crossing. The motorman need not continuously sound a gong on approaching a street crossing on a clear, still night when the car is in good condition, with an electric headlight, not much traffic, and there is no unusual obstruction preventing a view of the car by one approaching on the cross-street. Stafford v. Chippewa Val. El. R. Co. (Wis.), 85 N. W. 1036; Johnson v. H. R. R. Co., 20 N. Y. 65; Shea v. Potero, etc., Co., 44 Cal. 414; East Memphis City Ry. Co. v. Logue, 13 Lea (Tenn.), 32, 15 Am. & Eng. R. Cas. 459.

Texas statute requiring the blowing of whistle or the ringing of bell upon railway trains does not apply to street railroads.<sup>74</sup>

**§ 9. Duties of motormen, gripmen, etc.**— The driver of an ordinary vehicle is bound to be watchful at all points in a crowded city street, elsewhere as well as at a crossing.<sup>75</sup> This rule is certainly applicable to the one controlling the propulsive power of a street car. At the intersection of two streets, the driver of a vehicle or a pedestrian has the right to cross the tracks of a street surface railroad, notwithstanding a car is in sight; provided there is a reasonable opportunity so to do, and if, for that purpose, it is necessary for the person having charge of the motive power of the car to check its speed, or even to entirely stop such car for a short period, it is his duty to do so, and the person crossing the track has the right, without being necessarily chargeable with contributory negligence, to assume that that duty will be performed; the rights of the driver of the vehicle or of the pedestrian and of the person in charge of the motive power of such car, under these circumstances, are reciprocal, and the question whether it is negligence on the part of the traveler to cross the track when a car is approaching is dependent upon the circumstances of each case.<sup>76</sup> The question

74. *Citizens' St. R. Co. v. Holmes*, 19 Tex. Civ. App. 266, 46 S. W. 116.

75. *Moebus v. Herrmann*, 108 N. Y. 349; *Wells v. Brooklyn City Ry. Co.*, 58 Hun (N. Y.), 389, 34 St. Rep. (N. Y.) 636, 12 N. Y. Supp. 67.

76. *Piercy v. Met. St. R. Co.*, 30 Misc. Rep. (N. Y.) 612, 615, 62 N. Y. Supp. 867; *Sickler v. North Jersey St. R. Co.* (N. J.

Sup.), 46 Atl. 779; *Highland Ave. & B. R. Co. v. South*, 112 Ala. 642, 20 So. 1003. A driver on a highway is not bound to take special precautions against being struck by a switch stick which falls from the hands of a conductor of a trolley car while using it to free the trolley from a frog in the wires. *Manning v. West End St. R. Co.*, 166 Mass. 230, 44 N. E. 135. And see *Hickman v. Union Depot*

in every case is: Did the approaching parties, the cardriver on the one hand and the person crossing the track on the other, use the ordinary care of reasonably prudent persons to avoid a collision under the given conditions? In the nature of things, that question must always be submitted to the jury.<sup>77</sup> It may be said generally however that the person controlling the motive power of a street car must use the highest degree of care to avoid injury to a person after discovering his peril.<sup>78</sup> If a person be run down and under the car, without his (the motorman's) negligence, and he uses his best judgment in the sudden emergency to extricate him, the company is not liable for any further injury.<sup>79</sup> While it

R. Co., 47 Mo. App. 65; Baltimore Tract. Co. v. Wallace (Md.), 21 Wash. L. Rep. 313, 26 Atl. 518; Hergert v. Union R. Co., 25 App. Div. (N. Y.) 218, 49 N. Y. Supp. 307; Kennedy v. Third Ave. R. Co., 31 App. Div. (N. Y.) 30, 52 N. Y. Supp. 551. Where the space between a standing carriage and the car tracks is very small a car driver approaching from the rear without warning is negligent. Tarler v. Met. St. R. Co., 21 Misc. Rep. (N. Y.) 684, 47 N. Y. Supp. 1090. And see Saffer v. Westchester El. R. Co., 22 Misc. Rep. (N. Y.) 555, 49 N. Y. Supp. 998; West Chicago St. R. Co. v. McCallum, 169 Ill. 240, 48 N. E. 424, affg. 67 Ill. App. 645; Stanley v. Union Depot R. Co., 114 Mo. 606, 56 Am. & Eng. R. Cas. 561, 21 S. W. 832.

77. Lauson v. Met. St. R. Co., 40 App. Div. (N. Y.) 312, 313; O'Leary v. Brockton St. R. Co., 177 Mass. 187, 58 N. E. 585; Hogan v. Jones, 131 Cal. 521, 63 Pac.

835; Montgomery v. Johnson (Ky.), 58 S. W. 476, 22 Ky. L. Rep. 596; Knoll v. Third Ave. R. Co., 46 App. Div. (N. Y.) 527, 62 N. Y. Supp. 16; affd., 60 N. E. 1113.

78. Louisville R. Co. v. Blaydes (Ky.), 52 S. W. 960; Warren v. Manchester St. Ry. Co. (N. H.), 47 Atl. 735; Wills v. Ashland, etc., Ry. Co., 108 Wis. 255, 84 N. W. 998; Legare v. Union Ry. Co., 61 App. Div. (N. Y.) 202, 70 N. Y. Supp. 718; Manor v. Bay Cities Consol. R. Co., 118 Mich. 1, 76 N. W. 139, 5 Det. Leg. N. 420; Gutierrez v. Larago El. Ry. Co. (Tex. Civ. App.), 45 S. W. 310; Cohen v. Met. St. R. Co., 71 N. Y. Supp. 268; Moore v. Charlotte El. St. R. Co. (N. C.), 39 S. E. 57; Toledo El. St. R. Co. v. Westtenhuber, 22 Ohio C. C. 67, 12 O. C. D. 22.

79. Trussell v. Union Tract. Co. (Pa. C. P.), 31 Pittsb. L. J. (N. S.) 15.

cannot be said as matter of law that he may assume that the driver of a vehicle will not cross the track in dangerous proximity to his approaching car, it may be said that where the speed of his car is not unreasonable and he spares no effort to check it so as to avoid collision, the company is not negligent.<sup>80</sup> Seeing a person driving along the road parallel with the track as though he had no intention of crossing it, he is not guilty of negligence because he did not anticipate that such person would suddenly turn across the track in the middle of a block.<sup>81</sup> But if he sees the driver of a wagon in front of him does not look back, nor pay any attention to the ringing of the bell, nor increase his rate of speed, nor attempt to leave the track, it is his duty to bring his car under control and even to stop, if necessary, to avoid collision.<sup>82</sup> He should stop his car at once upon seeing the wheels of a heavily loaded wagon in front of it slip on the track while the driver is attempting to get out of the way.<sup>83</sup> He may safely assume

80. *Sauers v. Union Tract. Co.*, 193 Pa. St. 602, 44 Atl. 917; *McFarland v. Third Ave. R. Co.*, 29 Misc. Rep. (N. Y.) 121, 60 St. Rep. (N. Y.) 273; *Jacksonville v. Lamb*, 86 Ill. App. 487; *Wilson v. Memphis St. Ry. Co.*, 105 Tenn. 74, 58 S. W. 334; *Harmon v. Pa. Tract. Co. (Pa.)*, 49 Atl. 755; *Kessler v. Citizens' St. R. Co.*, 20 Ind. App. 427, 50 N. E. 891; *Phillips v. People's Pass. R. Co.*, 190 Pa. St. 222, 42 Atl. 686, 43 W. N. C. 531, 5 Am. Neg. Rep. 719; *Siek v. Toledo, etc., St. R. Co.*, 16 Ohio C. C. 393, 9 O. C. D. 51; *De Lon v. Kokomo City St. R. Co.*, 22 Ind. App. 377, 1 Repr. 1050, 49 Cent. L. J. 7, 53 N. E. 847.

81. *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283, 35

Pac. 920; *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018.

82. *Sears v. Seattle Consol. St. R. Co.*, 4 Am. Electl. Cas. 423, 6 Wash. 227; *Hicks v. Citizens' R. Co.*, 124 Mo. 115, 25 L. R. A. 508, 27 S. W. 542.

83. *Bush v. St. Joseph, etc., St. R. Co.*, 113 Mich. 513, 71 N. W. 851, 4 Det. Leg. N. 377. He may be negligent in increasing the speed of his car, after having it under full control, when a few feet behind a wagon loaded with bales, so close to the track as to be rubbed by the car in passing. *Blakeslee v. Consol. St. R. Co.*, 112 Mich. 65, 70 N. W. 408, 29 Chic. Leg. N. 257, 3 Det. Leg. N. 844; *Davidson v. Schuylkill Tract.*

that one standing upon the track will step out of the way in time to avoid the car in the absence of anything to indicate that he does not hear the signals, although in fact he is deaf.<sup>84</sup> When, to avoid an impending collision, the motorman is obliged to choose instantly one of two appliances provided for stopping his car, he is not guilty of, and the company is not chargeable with negligence, because the event proves that the one he chose and used may not have been the best to meet the exigency; especially when the one selected is the more reliable, though possibly not as prompt in action.<sup>85</sup>

Co., 4 Pa. Super. Ct. 86; Will v. West Side R. Co., 84 Wis. 42, 54 N. W. 30.

84. Lyons v. Bay Cities Consol. R. Co., 115 Mich. 114, 73 N. W. 139, 4 Det. Leg. N. 797; Doyle v. West End St. R. Co., 161 Mass. 533; Daly v. Detroit Citizens' R. Co., 105 Mich. 193; O'Rourke v. New Orleans, etc., Co., 51 La. Ann. 755, 25 So. 323; Beem v. Tama, etc., Co., 104 Iowa, 563, 73 N. W. 1045, 10 Am. & Eng. R. Cas. (N. S.) 610; Schulte v. New Orleans, etc., Co., 44 La. Ann. 509, 10 So. 811; Houston City St. R. Co. v. Woodlock (Tex. Civ. App.), 29 S. W. 817; Houston City St. R. Co. v. Farrell, 27 S. W. 942; Sonnenfeld Millinery Co. v. People's R. Co., 59 Mo. App. 68. Citizens' St. R. Co. v. Shepherd (Tenn.), 64 S. W. 710. Where it appeared that some sixty feet from a street crossing the motorman saw a five-year old girl about twelve feet from the track, at the crossing, starting to cross it, applied the brake and sounded the gong; the child moved forward looking at the car and stopped

about three feet from the track; the motorman then released the brake, when within about six feet of the crossing the child suddenly started to cross and was run over and killed; the car was stopped about sixty or seventy feet from the crossing. There was testimony that it was running sixteen miles per hour, and also that it was running only eight miles per hour. It was held that the motorman was not guilty of negligence entitling the plaintiff to recover. Tishacek v. Milwaukee El., etc., Co. (Wis.), 85 N. W. 971. Where the complaint simply charges negligence, evidence of a willful intent to injure, or reckless disregard of plaintiff's safety, is inadmissible. McClelland v. Chippewa Valley Ry. Co. (Wis.), 85 N. W. 1018.

85. Stabenau v. Atlantic Ave. R. Co., 155 N. Y. 511, 50 N. E. 277; Bitner v. Crosstown St. R. Co., 153 N. Y. 76; Wynn v. Central Park, etc., R. Co., 133 N. Y. 575; Lewis v. Long Isl. R. Co., 162 N. Y. 52, 62; Stabenau v. Atlantic Ave. R. Co., 6 Am. Electl. Cas. 552, 15 App. Div. (N. Y.) 408;

A motorman has the right to assume that an active child would not voluntarily run upon, or remain upon, the track in front of an approaching car, when an easy motion would remove him from peril, and his omission to suddenly stop the car in such a case, to the discomfort and possible injury of the passengers, is not negligence.<sup>86</sup> But he must be watchful for children, and so manage his car as to be able to stop it quickly if a child do appear upon the track; and if the child be a small child, say seven or eight years of age, or under, it will not do merely to sound a warning and be certain that the child knows of the approaching car, he must stop to avoid collision.<sup>87</sup> The plaintiff must fail if the evidence does not

Bishop v. Bell City R. Co., 92 Wis. 139, 65 N. W. 733.

86. Fenton v. Second Ave. R. Co., 126 N. Y. 625; Stabenau v. Atlantic Ave. R. Co., 155 N. Y. 511; Same v. Same, 6 Am. Electl. Cas. 552, 15 App. Div. (N. Y.) 408; Campbell v. New Orleans City R. Co., 104 La. 183, 28 So. 985; Holdridge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109; Callary v. Easton, etc., Co., 185 Pa. St. 176, 39 Atl. 813; Mulcahy v. El. Tract. Co., 185 Pa. St. 427, 39 Atl. 1106; Kierzenkowski v. Phila. Tract. Co., 184 Pa. St. 459, 39 Atl. 220, 9 Am. & Eng. R. Cas. (N. S.) 534; Mt. Adams & E. P. R. Co. v. Cavagna, 6 Ohio C. C. 606; Paducah St. R. Co. v. Adkins (Ky. Super. Ct.), 14 Ky. L. Rep. 425. He is not however, as matter of law, free from negligence in attempting to run the car past a girl nine years old, who is running away from it toward a part of the street where it is obstructed to within three feet of the track. Calumet El. St. R.

Co. v. Van Pelt, 68 Ill. App. 582, 29 Chic. Leg. N. 197, 2 Chic. L. J. Wkly. 110. He is not chargeable with negligence on seeing a child in the gutter indicating no intention to cross the street until the car was within ten feet, when she suddenly attempted to cross it and was injured. Fleischmann v. Neversink M. R. Co., 6 Am. Electl. Cas. 573, 174 Pa. St. 510, 34 Atl. 119. And see McLaughlin v. New Orleans & C. R. Co., 48 La. Ann. 23, 18 So. 703; Funk v. El. Tract. Co., 175 Pa. St. 559, 34 Atl. 861; Ogier v. Albany R. Co., 88 Hun (N. Y.), 486, 34 N. Y. Supp. 867; Gannon v. New Orleans City & L. R. Co., 48 La. Ann. 1002, 20 So. 223.

87. Elwood El. St. Ry. Co. v. Ross (Ind. App.), 58 N. E. 535; Schmidt v. St. Louis R. Co. (Mo.), 63 S. W. 834; Oster v. Schuylkill Tract. Co. (Pa.), 45 Atl. 1006; Fullerton v. Met. St. R. Co., 63 App. Div. (N. Y.) 1; 71 N. Y. Supp. 326; Goldstine v. D. D., etc.,

show that the injury was the result of some cause for which the defendant is responsible, and where the proof is by circumstances, the circumstances themselves must be shown and not left to rest in conjecture, and, when shown, it must appear that the inference sought is the only one which can fairly and reasonably be drawn from the facts.<sup>88</sup> Then too

R. Co., 35 Misc. Rep. (N. Y.) 200, 71 N. Y. Supp. 477; Griffiths v. Met. St. R. Co., 63 App. Div. (N. Y.) 86, 71 N. Y. Supp. 406; San Antonio St. R. Co. v. Mechler (Tex.), 30 S. W. 899; Wallace v. City & S. R. Co., 26 Oreg. 174, 37 Pac. 477, 25 L. R. A. 663; North Chicago St. R. Co. v. Hoffart, 82 Ill. App. 539; Bergen Co. Tract. Co. v. Heitman, 61 N. J. L. 682, 40 Atl. 651, 11 Am. & Eng. R. Cas. (N. S.) 286, 4 Am. Neg. Cas. 511; Rice v. Crescent City R. Co., 41 La. Ann. 108, 24 So. 791; Rack v. Chicago City R. Co., 173 Ill. 289, 50 N. E. 668; Adams v. Met. St. Ry. Co., 69 N. Y. Supp. 1117, 60 App. Div. (N. Y.) 188. If it appear that a child less than five years of age started to cross a street in front of a rapidly moving electric car 100 feet distant, a question of fact is raised whether prudence would require the motorman to act upon the assumption that the child was about to attempt to cross in advance of the car, and demand that he so regulate its speed as to avoid running the child down. Adams v. Nassau El. R. Co., 51 App. Div. (N. Y.) 241, 64 N. Y. Supp. 818; Gumby v. Met. St. R. Co., 29 App. Div. (N. Y.) 335; Kitay v. Brooklyn, Q. C. & S. Ry. Co., 23 App. Div. (N. Y.) 228; Muller v. Brooklyn Heights

R. Co., 18 App. Div. (N. Y.) 177; Nugent v. Met. St. R. Co., 17 App. Div. (N. Y.) 585. It appeared that a boy fourteen years of age walked in the street at a distance of five or six feet from the street car track while a motor-car was coming up behind at a rate of three to six miles an hour; the motorman, inexperienced, saw the boy but did not sound the gong or check the car's speed, though the boy was constantly nearing the track; he called to the boy when he got near the track without reversing the motor, and the boy stepped on the track when the car was within about five feet of him and was killed. It was held that the conduct of the motorman was not so reckless or wanton as to show a willful intention to injure the boy. Wills v. Ashland Light, Power & St. Ry. Co., 108 Wis. 255, 84 N. W. 998. And see Chicago City Ry. Co. v. Tuohy, 95 Ill. App. 314; Aiken v. Holyoke St. Ry. Co. (Mass.), 61 N. E. 557.

88. Laidlaw v. Sage, 158 N. Y. 73, 101; Ruppert v. Brooklyn Heights R. Co., 154 id. 90, 94; White v. Albany R. Co., 35 App. Div. (N. Y.) 23, 54 N. Y. Supp. 445; Frank v. Met. St. R. Co., 44 App. Div. (N. Y.) 243, 60 N. Y. Supp. 616. So where it appeared that defendant maintained two

tracks upon a street where a boy was playing and that the latter, in running diagonally across the street, passed behind the car going north and as he did so the car going south was about forty feet north of him on the other track; upon reaching the space between the tracks the boy stood looking at the car for some appreciable length of time, then started to cross and was struck by the south-bound car; held no proof of negligence on the part of defendant. *Greenberg v. Third Ave. R. Co.*, 35 App. Div. (N. Y.) 619, 55 N. Y. Supp. 135; *De Ioia v. Met. St. R. Co.*, 37 App. Div. (N. Y.) 455, 56 N. Y. Supp. 22; *Ewing v. Atlantic Ave. R. Co.*, 34 St. Rep. (N. Y.) 113, 11 N. Y. Supp. 626; *Mahoney v. N. Y. C. & H. R. R. Co.*, 39 St. Rep. (N. Y.) 911, 9 N. Y. Supp. 546. Negligence is not established by showing that a car-driver failed to stop his car, although as soon as his attention was called to a man lying on the track in a dark part of the street, at night, he immediately put on the brake and stopped the car within its length. *Murray v. Forty-second St., etc., R. Co.*, 9 App. Div. (N. Y.) 610, 41 N. Y. Supp. 620. But where it does not appear that the driver of the car saw the plaintiff until after the accident, the court will not reverse the judgment on appeal because of a charge that the highest degree of care is required of a driver of a car who sees a person lying helpless on the track in front of him. *Giralso v. Coney Isl. & B. R. Co.*, 42 St. Rep. (N. Y.) 915, 16 N. Y. Supp. 774.

It is the duty of the motorman:

Seeing a horsecar or other vehicle in front of him to so manage and control the speed of his car as to avoid collision. *Wynne v. Atlantic Ave. R. Co.*, 14 Misc. Rep. (N. Y.) 394, 35 N. Y. Supp. 1034, 70 St. Rep. (N. Y.) 737; *McConnell v. Atlantic Ave. R. Co.*, 11 Misc. Rep. (N. Y.) 177, 32 N. Y. Supp. 114, 65 St. Rep. (N. Y.) 170.

To avoid collision with vehicles traveling upon streets crossing his tracks. *Kerr v. Atlantic Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 264, 63 St. Rep. (N. Y.) 310, 30 N. Y. Supp. 1070.

To have his car under control when approaching a crosswalk or cross-street, in order to avoid injury to foot passengers and vehicles thereon. *Young v. Atlantic Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 541, 31 N. Y. Supp. 441, 64 St. Rep. (N. Y.) 126; *Jones v. Brooklyn Heights R. Co.*, 10 Misc. Rep. (N. Y.) 543, 31 N. Y. Supp. 445, 64 St. Rep. (N. Y.) 22; *West Chicago St. R. Co. v. Allen*, 82 Ill. App. 128.

Discovering a boy on the step of a platform to stop and take him inside or put him off, not to frighten him into jumping off. *Leving v. Second Ave. Tract. Co.*, 194 Pa. St. 156, 45 Atl. 134.

The driver of a street car on a street railroad, in driving horses attached to such car, must sit or stand on the front platform or place provided for him, maintain control of the horses and car and exercise a reasonable degree of care and watchfulness to prevent collisions and injuries to persons driving on or over such street. *Brooks v. Lincoln Ry. Co.*, 22 Nebr. 816, 36 N. W. 529. If the

the defendant's negligence must be the proximate cause of the injury,<sup>89</sup> and must be established by a fair preponderance of proof.<sup>90</sup> It is not negligence in itself to run a street car in the opposite direction from which it is usually run.<sup>91</sup>

company permit a boy to drive a bobtail car, and he invites or encourages other boys to get on, it is liable for the death of one of them caused by an attempt to get off, at the command of the conductor, while the car was in motion. *Hestonville, M. & F. R. Co. v. Biddell*, 16 Atl. 428, 24 W. N. C. 156.

If it appear that at the time his car ran over and injured a child he was looking at persons assembled at the side of the street, and so failed to see the child in time to prevent the injury, the question of negligence is raised (*Harkins v. Tract. Co.*, 6 Am. Electl. Cas. 569, 173 Pa. St. 149); or, if after seeing the child start from the sidewalk toward the track, twenty-five feet distant, he brought the car nearly to a full stop, and then seeing the child turn from the track, released the brake and the child then suddenly turned across the track and the car struck her, his negligence is a question for the jury. *Woeckner v. Erie El. Motor Co.*, 6 Am. Electl. Cas. 581.

89. It appeared the motorman was looking inside the car and did not see the horse he collided with until just before the collision, which was caused by the sudden starting of the horse across the track, and the car which was running within the time allowed by ordinance could not have been

stopped in time to avoid the collision, even if the motorman had been free from negligence. *Hoffman v. Syracuse Rapid Transit Co.*, 50 App. Div. (N. Y.) 83, 63 N. Y. Supp. 442.

90. The negligence of the defendant, as claimed, consisted in running a car without a light in the nighttime. The plaintiff testified positively that there was no headlight; two witnesses corroborated him but were not so positive in their testimony. Six witnesses testified for defendant that the car was lighted by electricity, and the headlight burning as it approached the plaintiff — two of them, the motorman and conductor, on the car itself — who had every means of knowing and could not be mistaken in their testimony that all the lights were lighted. On motion, the verdict was set aside, as against the weight of evidence. *Doyle v. The Albany Railway*, 32 App. Div. (N. Y.) 87, 52 N. Y. Supp. 602.

91. *North Chicago St. R. Co. v. Irwin*, 82 Ill. App. 146. A driver was caught unavoidably in a crowded street on a street railway track; several cars were in front of him, some behind, and he was prevented from turning to the left by a car on another track, to the right by a crowd in the street. A street car in front ran backward, collided with one imme-

**§ 10. Compliance with statute, municipal, and other regulations.**—A municipality cannot, by ordinance, create a right of action between third persons, nor enlarge the common-law liability of citizens between themselves, hence, the violation of such an ordinance, prescribing a penalty for failure to comply therewith, requiring a motorman to keep a vigilant watch for persons on or moving toward the track and on the first appearance of danger to stop the car in the shortest time possible, will not authorize a recovery against the company for causing the death of a person on the track, without proof that the company had agreed to be bound by such ordinance.<sup>92</sup> Since such an ordinance is not enacted for the special benefit of any person or class of persons, but simply pertains to the conduct of the companies toward the community as a whole, no other liability follows the violation than the penalty imposed by the ordinance itself.<sup>93</sup> It is

diately in front of the driver and set it in motion, causing injury to his team. The collision ought to have been foreseen by those in charge of the car run backward. The defense was that the car came down the grade because the motorman had lost control of it. *Held*, a question for the jury. *Kessock v. Consol. Tract. Co.*, 15 Pa. Super. Ct. 103.

92. *Holwerson v. St. Louis & S. Ry. Co.*, 157 Mo. 216, 57 S. W. 770. One seeking to recover damages because of an infraction of a municipal ordinance and personal injuries caused thereby must show, by proof, the existence of the ordinance and its acceptance by the defendant. *McAndrews v. St. Louis & S. R. Co.*, 83 Mo. App. 233.

93. *Holwerson Case, supra*; *Murphy v. Lindell Ry. Co.*, 153 Mo. 252, 54 S. W. 442; *Day v. Citizens' Ry. Co.*, 81 Mo. App. 471; *Stafford v. Chippewa Valley El. R. Co. (Wis.)*, 85 N. W. 1036. In the case last cited, the ordinance was a condition in the grant of the franchise to the company and required the continuous ringing of a bell on a street car while in motion, and was held unreasonable. While the violation of the ordinance is not negligence *per se*, it is evidence of negligence. *Hall v. Ogden St. R. Co.*, 6 Am. Electl. Cas. 598, 13 Utah, 243, 4 Am. & Eng. R. Cas. (N. S.) 77, 44 Pac. 1046; *Highland Ave. & B. R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566; *Connor v. El. Tract. Co.*, 173 Pa. St. 602, 38 W. N. C. 12, 34 Atl. 238; *Buys v.*

nevertheless such a breach of duty as may be made the foundation of an action by a person sustaining special damages where the other elements of actionable negligence concur; and this rule is of special application to cars propelled by electricity.<sup>94</sup> If the ordinance enact the maximum rate of speed at which an electric car may be run within the municipality, a greater rate of speed constitutes negligence, and one driving upon or along the track may assume that the ordinance will be complied with.<sup>95</sup> But the mere fact that the street car is running in excess of the rate permitted by the ordinance will not entitle an injured party to submit the question of negligence to the jury, unless there is evidence showing that the motorman could have avoided the injury if the speed had been within the permitted rate.<sup>96</sup>

Third Ave. R. Co., 45 App. Div. (N. Y.) 11, 61 N. Y. Supp. 113; Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 544; Quincy H. Ry., etc., Co. v. Gnuse, 38 Ill. App. 212; Ramsay v. Montreal St. Ry. Co., 32 C. L. J. 52; Wright v. Malden & Melrose R. Co., 4 Allen (Mass.), 283; Wall v. Helena St. R. Co., 12 Mont. 44, 20 Am. & Eng. R. Cas. 474, 29 Pac. 721.

There must be evidence that the rate provided by the city ordinance was exceeded, otherwise there is no error in excluding the ordinance. Wosika v. St. Paul Ry. Co. (Minn.), 83 N. W. 386.

Earlier, in Missouri, it was held that failure to observe the degree of care in running a street car, which is required by a valid ordinance, imposing a penalty therefor, renders the street car company liable to a person who is injured in consequence, although such de-

gree of care may be higher than that which would otherwise be required by law. Fath v. Tower Grove & L. R. Co., 105 Mo. 537, 50 Am. & Eng. R. Cas. 426, 16 S. W. 913, 13 L. R. A. 74; Senn v. So. R. Co., 135 Mo. 512, 36 S. W. 367.

94. Omaha St. R. Co. v. Duvall, 5 Am. Electl. Cas. 502, 40 Nebr. 29, 58 N. W. 531.

95. Hays v. Tacoma Ry. & Power Co. (U. S. C. C. Wash.), 106 Fed. 48.

96. Molyneaux v. S. W. Mo. El. R. Co., 81 Mo. App. 25. The New Hampshire statute, providing that no person shall ride through any street in a compact part of any town at a swifter pace than at the rate of five miles an hour, applies to a street railroad company whose charter provides that the road may be operated by such power as may be authorized by

And when the rate at which the car was going is disputed, or the place of stopping at a crossing is in question, ordinances and police regulations concerning these matters are admissible to show the greater probability of the contention which is in accordance with the ordinance.<sup>97</sup> But a statute, municipal, or other regulation can never justify negligence. If it be provided that the street car shall at all times be entitled to the track, and any vehicle thereon shall turn out upon its approach so as to leave the track unobstructed, the driver of a car is not justified in running down a person in a sleigh near the track who makes no effort to get out of the way.<sup>98</sup> If all persons are forbidden to engage in any game or exercise within a highway which shall interfere with the convenient use thereof, it does not lessen the care which the motorman of an electric car is bound to use toward a child, *non sui juris*, who is playing in the street.<sup>99</sup> A limitation of the rate of speed is not authority to run up to the limit regardless of existing circumstances and conditions.<sup>1</sup> A municipal ordinance may require a street railroad company to run its cars every six minutes on a specified street, and it will not be held unreasonable unless it is clearly made to appear that the action of the council was capricious and arbitrary and that the public convenience did not require cars

the mayor and aldermen, who have the power to make such regulations as to the rate of speed as the public safety and convenience require, where no regulations have been made by them in regard to speed. *Bly v. Nassau St. R. Co.*, 67 N. H. 474, 30 L. R. A. 303, 32 Atl. 764. And see *Martineau v. Rochester R. Co.*, 81 Hun (N. Y.), 263, 62 St. Rep. (N. Y.) 722, 30 N. Y. Supp. 778.

97. *Maisels v. D. D., etc.*, St. R. Co., 16 App. Div. (N. Y.) 391; *Stiasny v. Met. St. R. Co.*, 58 App. Div. (N. Y.) 172, 68 N. Y. Supp. 694.

98. *Laethan v. Fort Wayne & B. I. R. Co.*, 100 Mich. 297, 58 N. W. 996.

99. *Budd v. Meriden El. R. Co.*, 69 Conn. 272, 37 Atl. 683.

1. *Quincy Horse R. Co. v. Gnuse*, 38 Ill. App. 212.

to run so often.<sup>2</sup> It may also require the car to come to a full stop before a crossing.<sup>3</sup> It may also require both driver and conductor to accompany every street car.<sup>4</sup> If the municipal ordinance be inconsistent with itself, for example, if it fix eight miles an hour as the maximum speed for street cars and also require street railroad companies to operate their cars according to the provisions of their charter, a company whose franchise provides that its cars may be run at a speed greater than eight miles an hour is entitled to so run them, since the franchise must be considered part of the charter.<sup>5</sup> The Maine statute imposing a liability for injuries caused by the negligence of the railroad company in erecting and maintaining its poles, although they are erected in compliance with city ordinances and its charter, is not abrogated by the charter of a company creating a lien on all its property prior to any mortgage in favor of the city to secure it against any liability for injury to person or property occasioned by the company's negligence.<sup>6</sup> The rule in Tennessee applicable in actions against street railroad companies for injuries resulting from noncompliance with statutory regulations to avoid accidents, that plaintiff's contributory negligence, however gross and proximate, will not bar his action, but only

2. *People v. Detroit Citizens' St. R. Co.*, 116 Mich. 132, 11 Am. & Eng. R. Cas. (N. S.) 798, 74 N. W. 520, 16 Nat. Corp. Rep. 436, 4 Det. Leg. N. 1108; *New York v. N. Y. & H. R. Co.*, 10. Misc. Rep. (N. Y.) 417, 31 N. Y. Supp. 147, 63 St. Rep. (N. Y.) 530. And see *New York v. Union Ry. Co.*, 31 Misc. Rep. (N. Y.) 451, 64 N. Y. Supp. 483.

3. *State, Cape May, etc., Co. v. City of Cape May*, 59 N. J. L. (30 Vroom) 404, 36 L. R. A. 657, 6

Am. & Eng. R. Cas. (N. S.) 329, 36 Atl. 678.

4. *South Covington & C. St. R. Co. v. Berry*, 18 S. W. 1026, 15 L. R. A. 604, 15 Am. & Eng. R. Cas. 434, 6 Am. R. & Corp. Rep. 258.

5. *Ruskinburg v. So. El. R. Co. (Mo.)*, 61 S. W. 626.

6. *Cleveland v. Bangor St. R. Co.*, 86 Me. 232, 29 Atl. 1005, 11 Am. R. & Corp. Rep. 492, 1 Am. & Eng. R. Cas. (N. S.) 336.

mitigate his damages, does not apply to a common-law action against an electric railroad company for injuries in a collision at a crossing.<sup>7</sup> The Missouri statute imposing a penalty of \$5,000 upon the death of any person from an injury due to negligence, unskillfulness, or criminal intent of any driver of any public conveyance, is applicable if a street-car driver fail to obey a city ordinance requiring drivers to keep a vigilant watch for all persons, especially children, on or moving toward the tracks, as a result of which negligence a child is killed.<sup>8</sup> The Washington statute requiring persons driving vehicles on a public highway to turn to the right on meeting others is not applicable to persons meeting a street car.<sup>9</sup> A railroad company is not negligent simply because a street car proceeds upon its left-hand track.<sup>10</sup> If a statute require notice of the time, place, and cause of an injury, occasioned by the negligence of a street railroad company, to be given to the company before action may be maintained thereon, one driving on the highway and injured by the neglect of a street railroad company to repair its road must give such notice.<sup>11</sup>

**§ 11. Municipal liability.**—A municipality's liability for its neglect to exercise care and supervision over electric wires suspended upon and along its streets is not lessened by the fact that individuals or corporations are subjected to a like duty and liability.<sup>12</sup> And the municipality may be negligent

7. *Saunders v. City & S. R. Co.*, 99 Tenn. 130, 41 S. W. 1031,  
2 Chic. L. J. Wkly. 522.

8. *Senn v. So. R. Co.*, 135 Mo. 512, 36 S. W. 367.

9. *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659, 29 Pac. 346.

10. *Altreuter v. H. R. R. Co.* (N. Y. C. P.), 2 E. D. Smith, 151.

11. *Maloney v. Walic*, 173 Mass. 587, 54 N. E. 349.

12. *Mooney v. Luzerne*, 186 Pa.

St. 161, 41 Atl. 311.

when the railroad corporation in the operation of its cars and the use of its electric wires or cables is free from fault; for example, a city had a derrick in use on a street whereon a car line was being operated and had a cable attached to the derrick extending across the railroad track to an engine. When the cable was taut it was at an elevation above the car track sufficient to allow the cars to pass under it; and the city had a flagman to give warning when it was dangerous to pass under the cable and to signal the motorman when it was safe to go forward; it being necessary however to lower the trolley pole to prevent its coming in contact with the cable. A car being signaled by the city's flagman to proceed, the motorman obeyed the signal and the base of the trolley pole caught the cable, dragged the derrick over and caused it to fall upon a person, killing him. In an action against the street car company to recover for the loss occasioned, it was held that it was the duty of the city to keep the cable stretched so defendant's cars could pass under it, and if the accident occurred by reason of the cable being slack, or because of the city's flagman signaling the motorman to proceed when there was danger, the negligence was not that of the company, but of the municipality.<sup>13</sup> It has been held in New York, that no recovery could be had against the city because of an improper location or careless management of a turntable by a street railroad company.<sup>14</sup>

13. *Baltimore Consol. R. Co. v. State*, 91 Md. 506, 46 Atl. 1000. It was claimed that the conductor's omission to lower the trolley pole was the cause of the accident. It appeared that he was in the forward part of the car collecting fares when the accident occurred,

instead of being on the rear platform to lower the trolley pole as the car passed under the cable. It was held however that this was not negligence which would enable the plaintiff to recover.

14. *Fitch v. City of New York*, 55 N. Y. Super. Ct. 494.

**§ 12. Joint liability of the company with other individuals.—**

If the negligence of another concur with that of the railroad company in causing an accident, the one injured may maintain an action against the wrongdoers, jointly or severally.<sup>15</sup> In such action it is immaterial which one of the defendants was the more culpable.<sup>16</sup> If it be proved that one of them was not negligent and the other was, the action may be dismissed as to the one, and judgment in favor of the plaintiff may be rendered against the other shown to be negligent.<sup>17</sup> If recovery be had against both, the judgment creditor is entitled to but one satisfaction. An accord and satisfaction

15. Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988. In the case cited, the court charged that, in the absence of any explanation, the accident (a collision of street cars upon independent lines at a crossing) resulted from want of ordinary care on the part of the defendants. When the plaintiff rested her case therefore the burden was upon the defendants of showing such facts as warrant the conclusion that the accident was due to circumstances which the exercise of ordinary care could not foresee and guard against. The instruction was held erroneous as against the company, upon whose car the plaintiff was not a passenger; that that defendant, not being the carrier, was bound only to the exercise of ordinary care in the management of its cars, and that no presumption would obtain as against it from the accident alone. Schneider v. Second Ave. Ry. Co., 133 N. Y. 585, 30 N. E. 752; Tompkins v. Clay St. Ry. Co., 66 Cal. 163;

Philadelphia & Reading R. Co. v. Boyer, 97 Pa. St. 916; Georgia Pac. Ry. Co. v. Hughes, 87 Ala. 610, 6 So. 413; Flaherty v. Northern Pac. R. Co., 39 Minn. 328, 40 N. W. 160; Jackson & S. St. R. Co. v. Simmons (Sup. Ct. Tenn.), 64 S. W. 705, 23 Am. & Eng. R. Cas. 236; Rahenkamp v. United Tract. Co., 14 Pa. Super. Ct. 635.

16. Barrett v. Third Ave. R. Co., 45 N. Y. 628. The court said: "If the acts of the defendant's servants contributed to the injury, the defendant must respond in damages to the plaintiff, although the negligent acts of the persons in charge of the other car also contributed to the same result, and the comparative degree in the culpability of the two will not affect the liability of either. If both were negligent in a manner and to a degree contributing to the result, they are liable jointly and severally." (Page 631.)

17. Schneider v. Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752.

by, or a release or other discharge by the voluntary act of the party injured, of one, of two, or more *tort feasors*, is a discharge of all.<sup>18</sup>

**§ 13. Street crossings.**—A street railroad company is under no duty to stop its cars before reaching a public crossing, for the purpose of looking and listening, when there is no apparent reason for so doing. It is chartered for the benefit of the public; the public require rapid transit, and if the motorman, driving one of these cars, were compelled to stop and look and listen for the approach of every vehicle likely to cross the railway line, the public would be greatly inconvenienced and rapid transit would be rendered impracticable.<sup>19</sup> It owes a duty to the public which requires it to so regulate the movement of its cars at the intersection of streets as not to unnecessarily expose pedestrians or drivers of vehicles to the danger of collision. For even a pedestrian has equal rights in a street at a street crossing with a street car company, and the latter owes him the duty of having its car under control, or at least of giving warning of its approach, and it must operate the same with reasonable care at such places.<sup>20</sup> It should take special care to avoid collision with children and aged and infirm persons on foot, whose infirmi-

18. Knickerbacker v. Colver, 8 Cow. (N. Y.) 111; Livingston v. Bishop, 1 Johns. (N. Y.) 290; Bronson v. Fitzhugh, 1 Hill (N. Y.), 185; Ruble v. Turner, 2 Hen. & M. (Va.) 38.

19. Savannah, Thunderbolt, etc., Ry. Co. v. Beasley, 5 Am. Electl. Cas. 429, 430, 94 Ga. 142, 21 S. E. 285; San Antonio St. R. Co. v. Mechler, 87 Tex. 628, 30 S. W. 899; Holmgren v. St. Paul City

Ry. Co., 5 Am. Electl. Cas. 499; Shea v. St. Paul City Ry. Co., 4 id. 481, 50 Minn. 395.

20. Towner v. Brooklyn Heights R. Co., 44 App. Div. (N. Y.) 628, 60 N. Y. Supp. 289; Price v. Charles Warner Co., 1 Penn. (Del.) 462, 42 Atl. 699; Wallen v. North Chicago St. R. Co., 82 Ill. App. 103; Wihnyk v. Second Ave. R. Co., 14 App. Div. (N. Y.) 515, 43 N. Y. Supp. 1023.

ties are plainly in evidence.<sup>21</sup> An electric car has no exclusive or superior right of way over a horse car at a point where the two lines intersect, or over any other vehicle at a street intersection. Ordinarily it may be said that it is the duty of the motorman or the driver of the car last arriving at the intersection to stop and let the other pass.<sup>22</sup> That one should stop and avoid a collision who can most easily and readily adjust himself and his vehicle to the exigencies of the case. And where the driver of an ordinary vehicle can do so the more readily, the motorman of an electric car has the right to presume that such duty will be performed.<sup>23</sup> The driver of a horse car, in approaching a street intersection, is justified in presuming that an approaching electric car about to cross his track is moving within the maximum rate of speed prescribed by law, and that its motorman will respect his right as that of the first arrival at the crossing, if he be such, either by slackening its speed or by coming to a full stop.<sup>24</sup> One nearing a street railway crossing at the inter-

21. Haight v. Hamilton St. R. Co. (Div. Ct. Canada), 29 Ont. 279; Wallace v. City & S. R. Co., 26 Oreg. 174, 25 L. R. A. 663, 37 Pac. 477.

22. Met. R. Co. v. Hammett (D. C.), 13 App. D. C. 370; Earle v. Consol. Tract. Co. (N. J.), 46 Atl. 613.

23. Helber v. Spokane St. R. Co., 22 Wash. 319, 61 Pac. 40; Becker v. Railroad Co., 121 Mich. 580; Warren v. Mendenhall, 77 Minn. 145; Bernhard v. Rochester R. Co., 68 Hun (N. Y.), 369, 51 St. Rep. (N. Y.) 880, 22 N. Y. Supp. 821; McLaughlin v. New Orleans & C. R. Co., 48 La. Ann. 23, 18 So. 703.

24. Met. R. Co. v. Hammett, 13 App. D. C. 370. In Michigan it is provided by law that "at all crossings of the tracks of two-street railways, when a car on each road approaches such crossing at substantially the same time, the car on the track first laid shall have precedence and be entitled to the right of way." It is held however that a street railroad company because of this statute cannot ignore a municipal ordinance requiring a car to come to a full stop before making the crossing, and that a car does not have the right of way until it stops in accordance therewith. Becker v. Detroit Citizens' St. Ry. Co. (Mich.),

section of streets, the view of which is impeded by vehicles, has the right to cross if, proceeding at a rate of speed which under the circumstances of the time and locality is reasonable, he would reach the point of crossing in time to safely go on the tracks in advance of an approaching electric car, the latter being sufficiently distant to be checked and, if need be, stopped before reaching him.<sup>25</sup> The car has no paramount right of way over a vehicle at the intersection of two streets. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other; and the right of each must be exercised in a reasonable and careful manner, so as not to unreasonably interfere with the right of the other.<sup>26</sup> In the absence of

80 N. W. 581. It was also held that a car stopping twenty feet from the crossing, when another car on the track first laid was at least 100 feet away, approaches the crossing before the latter within the meaning of this statute. *Id.* When two cars — the one a cable car — pass each other at a crossing so that one passing behind one of them is unable to see a car approaching on the other track, the cable car company is not as matter of law free from negligence. *West Chicago St. R. Co. v. Nelson*, 70 Ill. App. 171.

25. *New Jersey El. R. Co. v. Miller*, 39 N. J. L. (30 Vroom) 423, 36 Atl. 885, 6 Am. & Eng. R. Cas. (N. S.) 519; *Scannell v. Boston El. Ry. Co.*, 176 Mass. 170, 57 N. E. 341; *Cooney v. Southern El. R. Co.*, 80 Mo. App. 226, 2 Mo. App. Rep. 646; *Chicago Gen. Ry. Co. v. Carroll*, 91 Ill. App. 356; *affd.*, 59 N. E. 551. One standing upon a crosswalk between two

lines of tracks with the intention of boarding an approaching car, being struck by a car coming from the opposite direction, is not precluded from recovering because of his exposed position, where the defendant's negligent failure to check the speed of its car on nearing the crossing was the proximate cause of the accident. *Boentgen v. N. Y. & Harlem R. Co.*, 36 App. Div. (N. Y.) 460, 5 Am. Neg. Rep. 431, 55 N. Y. Supp. 847.

26. *O'Neil v. D. D., etc., Co.*, 129 N. Y. 125, 130, 29 N. E. 84, 41 St. Rep. (N. Y.) 107; *Huber v. Nassau El. Ry. Co.*, 22 App. Div. (N. Y.) 426, 48 N. Y. Supp. 38. See note to *Hicks v. Citizens' R. Co. (Mo.)*, 25 L. R. A. 508; *Omaha St. R. Co. v. Cameron*, 43 Nebr. 297, 61 N. W. 606; *Johnson v. Rochester Ry. Co.*, 70 N. Y. Supp. 113; *Shelly v. Brunswick Tract. Co. (N. J.)*, 48 Atl. 562; *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547; *Hergert v.*

statutory requirements therefor, the street railroad company is not bound to erect signs or maintain flagmen or gates at street crossings, although the road is operated by cable or electric power.<sup>27</sup> The driver of a car is negligent in whipping up his horses just before reaching a street crossing over which a boy is passing.<sup>28</sup> If a car be standing still at the crossing, receiving or discharging passengers, another car passing must not unnecessarily expose pedestrians to the danger of collision.<sup>29</sup> Where car tracks cross side streets they have no right of way over vehicles, and the driver of a car is as much bound to attempt to avoid a collision as the driver of a wagon. To constitute a street crossing, it is not essential that a street opening from one side of an avenue should be literally the continuation of one opening from the other side, if it is in effect a continuation.<sup>30</sup> The duty of the

Union Ry. Co., 25 App. Div. (N. Y.) 218, 49 N. Y. Supp. 307; O'Rourke v. Yonkers R. Co., 32 App. Div. (N. Y.) 8, 52 N. Y. Supp. 706.

27. Eckington & S. H. R. Co. v. Hunter (D. C. App.), 23 Wash. L. Rep. 401; Jacquin v. Grand Ave. Cable Co., 57 Mo. App. 320; Ott v. Kansas City, etc., R. Co., 58 Mo. App. 502.

28. Ellick v. Met. St. R. Co., 15 App. Div. (N. Y.) 556, 44 N. Y. Supp. 523; Fandell v. Third Ave. R. Co., 15 App. Div. (N. Y.) 426, 44 N. Y. Supp. 462.

29. Consol. Tract. Co. v. Scott, 6 Am. Electl. Cas. 516, 58 N. J. L. (29 Vroom) 683, 34 Atl. 1094, 59 Am. St. Rep. 620, 4 Am. & Eng. R. Cas. (N. S.) 371; Driscoll v. Market St. Cable R. Co., 97 Cal. 553; Scott v. Third Ave. R. Co., 41 St. Rep. (N. Y.) 152. If an

electric car standing near the crossing is suddenly started and collides with a wagon, the driver of which started to cross the track when the car was standing motionless and when neither the motorman nor the conductor were in sight on the car, the company is negligent. Piper v. Pueblo City R. Co., 4 Colo. App. 424, 36 Pac. 158.

30. Brozek v. Steineway, 23 App. Div. (N. Y.) 623, 48 N. Y. Supp. 345; Buhrens v. D. D., etc., Co., 53 Hun (N. Y.), 571, 25 St. Rep. (N. Y.) 191, 6 N. Y. Supp. 224; Hulett v. Brooklyn Heights R. Co., 63 App. Div. (N. Y.) 423, 71 N. Y. Supp. 531; Bresky v. Third Ave. R. Co., 16 App. Div. (N. Y.) 83. In the Hulett Case, *supra*, the court said: "Though the paramount right exists in the railroad company, yet where the rails

persons in charge of an electric car at a street crossing is not suspended or in any way modified by the fact that the crossing is at the end of a steep down grade;<sup>31</sup> or that a washout has occurred on one side of the track, where it does not appear how long such washout has existed.<sup>32</sup> Failure to sound a gong on approaching a crossing not in use by foot passengers does not render the company liable for an injury to one who suddenly runs on the track immediately in front of the car some distance from the crossing.<sup>33</sup>

**§ 14. Route other than at street crossings.**— A car may be moved rapidly between street crossings, provided however there is a vigilant lookout by those in charge of it. The cars have the right to expeditiously transport passengers on the surface of the streets, but that gives them no exclusive right to the surface occupied by their tracks. Neither at crossings

pass a *cul de sac*, the exercise thereof must be commensurate with the obvious difference between the unbroken part of a street and the part broken by the entrance of a *cul de sac*, which is used by vehicles for access to the street. For though the vehicles cannot use the *cul de sac* to cross the street, which necessarily is to pass over the rails, they may use it to enter the street, and therefore the paramount right must be exercised with ordinary reason and prudence in view of this use and the physical condition of the locality. For example, if a motorman knew, or in the exercise of ordinary care, prudence and experience ought to have known, that at the locality in question vehicles were accustomed to enter the street, and that the condition of

the entrance was such as warranted such vehicles, when managed with the same degree of care, to encroach temporarily upon the track while turning into the street from the *cul de sac*, it would be error for the court to refuse a request to charge the jury that this paramount right must be exercised with such ordinary and reasonable prudence as was commensurate with such circumstances. Such qualification would be proper because the right is but paramount and not exclusive." (Page 427.)

31. Price v. Charles Warner Co., 1 Penn. (Del.) 462, 42 Atl. 699.

32. Birmingham Ry. & E. Co. v. City Stable Co., 119 Ala. 615, 24 So. 558.

33. Kline v. El. Tract. Co., 181 Pa. St. 276, 37 Atl. 522, 40 W. N. C. 337.

nor between them is the public right relinquished. The fact that more caution should be exercised in running over crossings than on the streets between them warrants no inference that the car can be run without caution except on approaching crossings; in the one case, rapid running is of itself evidence of negligence; in the other, it is not. If it be run with comparative rapidity between crossings and not at unlawful speed, the question of fact still recurs in any action based on negligence, Did the motorman exercise care according to the circumstances?<sup>34</sup> Pedestrians and drivers of ordinary vehicles must use reasonable caution to keep out of the way of the car.<sup>35</sup> But the railroad company is not authorized, either carelessly or recklessly, to injure other persons along their route between crossings.<sup>36</sup> And a driver may, without negligence, attempt to cross a street railroad track

34. Evers v. Phila. Tract. Co., 6 Am. Electl. Cas. 575, 578, 176 Pa. St. 376; Citizens' St. R. Co. v. Howard, 102 Tenn. (52 S. W.) 474; Hot Springs St. R. Co. v. Johnson, 64 Ark. 420, 42 S. W. 833; Same v. Bert, 69 Ill. 388; Flewelling v. Railroad Co., 89 Me. 585, 36 Atl. 1056; Commonwealth v. Temple, 14 Gray (Mass.), 69; Moore v. Railroad Co., 126 Mo. 265, 29 S. W. 9; Adolph v. Railroad Co., 76 N. Y. 530; Atlantic Coast E. Ry. Co. v. Rennard, 62 N. J. L. 773, 42 Atl. 1041, 6 Am. Neg. Rep. 125; De Lon v. Kokomo City St. R. Co., 22 Ind. App. 377, 53 N. E. 847, 1 Repr. 1050, 49 Cent. L. J. 7; West Chicago St. R. Co. v. Dougherty, 89 Ill. App. 362.

35. Fenton v. Second Ave. R. Co., 126 N. Y. 625, 26 N. E. 967;

Ryan v. La Crosse City R. Co., 108 Wis. 122, 83 N. W. 770; Bethel v. Cincinnati St. R. Co., 15 Ohio C. C. 381, 8 O. C. D. 310; Manayunk, etc., Co. v. Union Tract. Co., 7 Pa. Super. Ct. 104, 42 W. N. C. 45; Rosenblatt v. Brooklyn Heights R. Co., 26 App. Div. (N. Y.) 600, 50 N. Y. Supp. 333; Ehrisman v. East Harrisburgh City Pass. R. Co., 4 Am. Electl. Cas. 486, 150 Pa. St. 180, 17 L. R. A. 448, 24 Atl. 596; Maxwell v. Wilmington City R. Co., 1 Marv. (Del.) 199, 40 Atl. 945; Smith v. El. Tract. Co., 187 Pa. St. 110, 42 W. N. C. 351, 40 Atl. 966.

36. Higgins v. Wilmington City R. Co., 1 Marv. (Del.) 352, 41 Atl. 86; North Chicago St. R. Co. v. Smadraff, 89 Ill. App. 411; affd. 59 N. E. 527.

without waiting for the passage of a cable car which is in sight, if there is reasonable opportunity to cross in front of the car, although it may be necessary for the gripman to slacken speed.<sup>37</sup> A driver may assume that it is safe for him to drive into a street from a cellar which is being excavated, where he is sixty-five feet from the point where the street railroad curves into the street and no car is in sight.<sup>38</sup>

**§ 15. Right of way.**—As has been stated, trolley cars and the drivers of ordinary carriages have equal rights upon the public streets and street crossings. The first to reach the crossing has the right to pass over first; but if it appears that the motorman does not intend to respect this right of priority and that the driver cannot, in the exercise of reasonable prudence, insist upon his right, he is guilty of contributory negligence if he fails to wait or turn aside, if he can do so by the use of due care and thus protect himself from injury.<sup>39</sup> Of necessity, the street cars have a right of way over their tracks, except at street crossings, which those traveling by other means must respect; but the motorman must keep a lookout and stop when it becomes apparent that a vehicle on

37. Kennedy v. Third Ave. R. Co., 31 App. Div. (N. Y.) 30, 52 N. Y. Supp. 551; Lawson v. Met. St. R. Co., 166 N. Y. 589, 59 N. E. 1124, affg. 57 N. Y. Supp. 997, 40 App. Div. (N. Y.) 307; Halliday v. Brooklyn Heights R. Co., 59 App. Div. (N. Y.) 57, 69 N. Y. Supp. 174; Witzell v. Third Ave. R. Co., 3 Misc. Rep. (N. Y.) 561, 52 St. Rep. (N. Y.) 521, 23 N. Y. Supp. 317.

38. Walsh v. Atlantic Ave. R. Co., 23 App. Div. (N. Y.) 19, 48 N. Y. Supp. 343.

39. Earle v. Consol. Tract. Co. (N. J.), 46 Atl. 613. And see West Chicago St. R. Co. v. Maday, 88 Ill. App. 49; affd., 58 N. E. 933; Lanfer v. Bridgeport Tract. Co., 68 Conn. 475, 37 Atl. 379, 2 Chic. L. J. Wkly. 287. But see Lake Roland El. R. Co. v. McKewen, 80 Md. 593, 31 Atl. 797; Zimmer v. Third Ave. R. Co., 36 App. Div. (N. Y.) 265, 55 N. Y. Supp. 308; Hall v. Ogden St. R. Co., 6 Am. Electl. Cas. 598; Gilmore v. Fed. St., etc., Ry. Co., 4 Am. Electl. Cas. 490, 153 Pa. St. 31.

the track cannot be removed in time to prevent a collision.<sup>40</sup> The rules as to rights of way applicable to steam railroads and travelers in the highway are not applicable to street railroads and wagons driving along the streets of a city.<sup>41</sup> A steam railroad has a right of way superior to that of a street car when their tracks cross.<sup>42</sup> The rule of the highways requiring drivers of vehicles to turn to the right when they meet does not apply when a street car is one of the vehicles.<sup>43</sup>

**§ 18. Ambulances, hose-carts, etc.**—In many municipalities the right of way between street cars and other vehicles, and particularly hose-carts, ambulances, fire-engines, etc., is established by ordinance, or in the charter or franchise granting the railroad company the right to operate in the city streets. Where a city ordinance provided that an "ambulance of the department of health" should have the right of way in the streets in an action to recover for injuries sustained in a collision between an ambulance and a street car in which plaintiff was a passenger, it was held that the ambulance, which did not belong to the department of health, but was under its jurisdiction, was not within the ordinance.<sup>44</sup> Al-

40. Mertz v. Det. El. R. Co., 83 N. W. 1036, 7 Det. Leg. N. 393; Armsted v. Mendenhall (Minn.), 85 N. W. 929; North Chicago El. Ry. Co. v. Penser, 190 Ill. 67, 60 N. E. 78; West Chicago St. R. Co. v. Schwartz, 93 Ill. App. 387; Woodland v. North Jersey St. R. Co. (N. J. Sup.), 49 Atl. 479; Traver v. Spokane St. R. Co. (Wash.), 65 Pac. 284; Central Pass. R. Co. v. Chatterson (Ky. Super. Ct.), 14 Ky. L. Rep. 663.

41. Smith v. Met. St. R. Co., 7 App. Div. (N. Y.) 253, 74 St. Rep. (N. Y.) 706, 40 N. Y. Supp. 148.

42. Du Bois Tract., etc., Co. v. Buffalo, etc., Co., 149 Pa. St. 1, 24 Atl. 179.

43. Brown v. Wilmington City R. Co. (Super. Ct. Del.), 1 Penn. (Del.) 332, 40 Atl. 936, 12 Am. & Eng. R. Cas. (N. S.) 439.

44. The court said there was no sufficient evidence here to establish the fact that this ambulance was within the ordinance. If the ordinance relates to all ambulances, there is no reason apparent why general words should not be used embracing all, for it is assumed that all the ambulances in use are in

though these vehicles have the right of way, the driver thereof must exercise reasonable care and prudence in driving across street railroad tracks. If he is negligent and is injured as a result of the negligence (combined with his own) of the street car company in failing to respect the right of way of his vehicle, he cannot recover.<sup>45</sup> His rapid driving however is not such contributory negligence as would preclude him from recovering in the event of a collision and in the absence of other negligence on his part.<sup>46</sup> A city ordinance giving ambulances the right of way is admissible in an action for injuries sustained by a street car colliding with an ambulance, since the violation of the ordinance is some evidence of negligence.<sup>47</sup> One driving a sprinkling-cart, permitting a wheel thereof to be on the street railroad track, who frequently turns to see that no car is coming and listens

some sense under the jurisdiction of the health department. *Dillon v. Nassau El. R. Co.*, 59 App. Div. (N. Y.) 614, 68 N. Y. Supp. 1098; *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. 829.

45. *Birmingham R. Co. v. Baker* (Ala.), 28 So. 87. Knowledge by the driver of a hose-cart that a street car company has promised to repair the track at a specified place is a circumstance to be considered by the jury in determining whether he used proper care in attempting to cross it; but his reliance on such promise cannot defeat a defense of contributory negligence if he failed to exercise due care. *Houston City St. R. Co. v. Richart*, 87 Tex. 539, 29 S. W. 1040; *Garrity v. Detroit Citizens' R. Co.*, 112 Mich. 369, 70 N. W. 1018, 37 L. R. A. 529, 4 Ohio Leg.

N. 46, 22 L. J. Wkly. 277. The mere fact that while he is putting on his belt a fireman sits in such a position on the truck as to be injured in a collision while passing a street car, will not prevent a recovery for the injury. *McGee v. West End St. Ry. Co.*, 151 Mass. 240. Neither is a fireman negligent in driving, with reasonable care, over a street car track, in the regular pursuit of his duties, although he knew its dangerous condition. *Elyhen Land Co. v. Mingea*, 89 Ala. 521. But see *Smith v. Union R. Co.*, 61 Mo. 588.

46. *Flynn v. Louisville R. Co. (Ky.)*, 62 S. W. 490.

47. *Buy's v. Third Ave. R. Co.*, 45 App. Div. (N. Y.) 11, 61 N. Y. Supp. 113.

for a bell, is not negligent so as to prevent his recovery for injuries sustained by being thrown from the cart in a collision with a car coming from behind when the only warning of its approach was given 700 feet away; its speed was accelerated, and there was no attempt to slacken speed until within two or three car lengths of the wagon, when, by reason of a defective appliance, the motorman was unable to stop.<sup>48</sup> Responding to an alarm of fire, the driver of a salvage wagon, driving perhaps fifteen miles an hour, is not so contributorily negligent that he cannot recover for an injury resulting from collision with a street car.<sup>49</sup>

**§ 17. Obstructing street with cars.**— In the absence of an ordinance forbidding or regulating it, a street railroad company may permit its cars to stand for a reasonable time upon the track, upon switches, or at either end of its route. In the absence of other circumstances, such a temporary obstruction of the street is neither a nuisance nor a negligent act. If however there be a penal ordinance forbidding it in the municipality, then the obstruction, in violation of the ordinance, is sufficient proof of negligence to make the company liable for damages if an injury be occasioned thereby.<sup>50</sup> Whether the cars should have been permitted to stand on the track in the street when they were not needed for carrying passengers, is a question to be determined by the city authorities; but the manner of leaving the cars and the place where they were left are competent facts to be proven in any

48. *Abrahams v. Los Angeles*, 124 Cal. 411, 57 Pac. 216.

49. *Flynn v. Louisville Ry. Co.* (Ky.), 62 S. W. 490.

50. As where one carriage is injured by the pole of another in a funeral procession suddenly

stopped by the stopping of a car at a crossing. *Mueller v. Milwaukee St. R. Co.*, 86 Wis. 340, 21 L. R. A. 721, 56 N. W. 914; *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88, 37 Atl. 39.

action in which it is claimed that the railroad company was negligent in so obstructing the street.<sup>51</sup> In violation of a city ordinance making it an offense to willfully obstruct streets by placing obstructions on a street car track, a street car company cannot confer valid authority or power upon an individual, nor could any act of the company excuse or justify a party's disregard of such ordinance.<sup>52</sup> The phrase "at each end of the lines" as used in the charter of a street car company forbidding cars to remain standing on any of the stations more than ten minutes, except "at each end of the lines," etc., means at each end of the tracks, and not at each end of the run of particular cars.<sup>53</sup>

**§ 18. Rate of speed.**—In nearly every State the municipal authorities, by statute, are authorized to regulate the rate of speed at which street cars should be operated upon the surface of the municipal streets. Accordingly, nearly every municipality has an ordinance upon the subject; and as it has been shown, the violation of such an ordinance is some proof of negligence. Ordinarily however the test of negligence in the rate of speed is the speed at which a reasonable and prudent man would have run the car under similar circumstances, and although the rate in a particular case might not have been in violation of an ordinance or of a statute regulation, it might be deemed negligent in view of the surrounding circumstances.<sup>54</sup> The violation of the ordinance

51. So held in an action for injuries sustained by an infant having been run over by one of defendant's street cars left in the street at the end of its line, and around which the infant and his companions were playing. *George v. Los Angeles Ry. Co.*, 126 Cal. 357, 46 L. R. A. 829, 58 Pac. 819.

52. *State v. Pratt*, 52 Minn. 131, 53 N. W. 1069.

53. *Wilson v. Duluth St. Ry. Co.*, 64 Minn. 363, 67 N. W. 82, 4 Am. & Eng. R. Cas. (N. S.) 53.

54. *Stafford v. Chippewa Val. E. Ry. Co.* (Wis.), 85 N. W. 1036; *Consolidated Tract. Co. v. Glynn*, 59 N. J. L. (30 Vroom) 432, 37

regulating the speed is not sufficient negligence upon which to maintain an action, unless such violation were the proximate cause of the injury.<sup>55</sup> Running an electric car at an unusually rapid rate over a much frequented crossing when the usual rate of travel on the line is from twelve to fourteen

Atl. 66; Birmingham R. & E. Co. v. City Stable Co., 119 Ala. 615, 24 So. 558; Ewing v. Toronto R. Co. (C. P.), 24 Ont. 694; Harbins v. Pittsb. A. & M. Tract. Co., 173 Pa. St. 149, 33 Atl. 1045, 38 W. N. C. 163, 26 Pittsb. L. J. (N. S.) 427; Newark Pass. R. Co. v. Bloch, 55 N. J. L. (26 Vroom) 605, 27 Atl. 1067, 56 Am. & Eng. R. Cas. 590, 22 L. R. A. 374; Gosnell v. Toronto R. Co. (Canada), 21 Ont. App. 553. If the injury is occasioned when the car is run at a reckless rate of speed, the company is not relieved from liability because the person injured was prevented from pulling out of the track by a wagon which was following a car on the adjoining track, in the absence of evidence of any improper conduct on the part of the driver of such wagon. Harper v. Phila. Tract. Co., 175 Pa. St. 129, 38 W. N. C. 349, 34 Atl. 356. Nor is it relieved by the fact that a driver in front of the street car, in his effort to avoid instantaneous disaster, was compelled to turn rapidly to the right, and, while he succeeded in clearing the track, he upset the cutter in attempting to drive over a ridge of ice and snow lying between the track and the highway, whereby one of the occupants of the cutter was thrown out, struck by the step or snow scraper on the rear end

of the car and killed. Countryman v. Fonda, J. & G. R. Co., 166 N. Y. 201, 59 N. E. 822; Walsh v. Atlantic Ave. R. Co., 23 App. Div. (N. Y.) 19. It cannot be said as matter of law that a speed of two and one-half miles an hour is not negligence, if a street car's appliances for stopping are defective. Roberts v. Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506. A street car company is not culpably negligent because its car was going faster than the maximum speed allowed by the city ordinance, where the mules hitched to the car became frightened at an engine and started up a street and before they had gone more than about fifty yards a child ran in front of the car only about three or four feet in advance of the mules and so near that the driver was unable to avoid the collision. Trumbo v. City St. Car Co., 89 Va. 780, 17 S. E. 124, 17 Va. L. J. 207. And see Francisco v. Troy & Lansingburgh R. Co., 78 Hun (N. Y.), 13, 29 N. Y. Supp. 247, 60 St. Rep. (N. Y.) 797.

55. Davidson v. Schuylkill Tract. Co., 4 Pa. Super. Ct. 86; Reilly v. Third Ave. R. Co., 16 Misc. Rep. (N. Y.) 11, 73 St. Rep. (N. Y.) 289, 37 N. Y. Supp. 593; Dederichs v. Salt Lake City Ry. Co., 6 Am. Electl. Cas. (Utah) 592.

miles per hour, constitutes negligence which is little less than wanton and reckless disregard of human life.<sup>56</sup> One crossing

56. Evansville St. R. Co. v. Gentry, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 378, 5 Am. & Eng. R. Cas. (N. S.) 500. The mere fact of running such a car at the rate of twelve or fifteen miles an hour does not constitute negligence. Bittner v. Crosstown St. Ry. Co., 153 N. Y. 76, 46 N. E. 1044; Cline v. El. Tract. Co., 181 Pa. St. 276, 40 W. N. C. 337, 37 Atl. 522; Hughes v. Camden & S. Ry. Co., 65 N. J. L. 203, 47 Atl. 441. Particularly where the city ordinance permits that rate of speed. White v. Albany R. Co., 35 App. Div. (N. Y.) 23, 54 N. Y. Supp. 445. If it appear that the accident occurred while the car was running on a down grade, in a populous part of the city, at from fifteen to twenty miles an hour, without signal, until within forty or sixty feet of the crossing, and that buildings obstructed the view of one crossing and injured in the collision, the company is negligent. Shea v. St. Paul City R. Co., 4 Am. Electl. Cas. 481, 7 Am. R. R. & Corp. Rep. 1, 50 Minn. 395, 52 N. W. 902. It may be negligence to run ten miles an hour through a street crowded with children, where the view in front of the car is unobstructed, unless careful lookout be kept. Buenta v. Pittsb. A. & M. Tract. Co., 2 Pa. Super. Ct. 185.

The motorman of an electric car is negligent in running his car at such a rate of speed that:

On a dark night he cannot see a wagon on the track in front of the car in time to prevent a colli-

sion. Calumet El. R. Co. v. Lynchholm, 70 Ill. App. 371; Schwarzbau v. Third Ave. R. Co., 54 App. Div. (N. Y.) 164, 66 N. Y. Supp. 367; United Ry. & El. Co. v. Seymour (Md.), 48 Atl. 850.

On a dark, windy, dusty night, at a high rate of speed, without having it properly lighted or sounding the gong. Tompkins v. Scranton Tract. Co. (Pa.), 3 Super. Ct. 576.

It cannot be stopped within 100 feet after an alarm given. Cross v. California St. Cable R. Co., 102 Cal. 313, 36 Pac. 373; Frank v. Met. St. R. Co., 58 App. Div. (N. Y.) 100.

With unreasonable overloading it cannot be stopped as soon as necessary to avert a collision. Richmond Ry. & E. Co. v. Garthright, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220.

It cannot be stopped within the distance covered by its head-light while running along a narrow and unlighted alley on a dark night. Gilmore v. Federal St., etc., Ry. Co., 4 Am. Electl. Cas. 490, 153 Pa. St. 31.

Injury was occasioned at a crossing, the person in charge of the motor not being on the lookout, nor having the car under control, nor using the proper means to stop it. Watson v. Minneapolis St. Ry. Co., 4 Am. Electl. Cas. 510, 53 Minn. 551, 55 N. W. 742.

Collision occurred in a cut, which, in anticipation of a change of grade, was made in a street in such manner that persons driving

street railroad tracks may assume that an approaching car is propelled at a reasonable rate of speed; and if there be an ordinance limiting the rate, that the ordinance is being complied with.<sup>57</sup> As matter of law, an electric street railroad company is guilty of negligence in running a car at a speed of forty-five miles an hour past platforms built on either side of a double track running east and west, connected by a crosswalk running from the sidewalk on the north side of the street, there being no sidewalk on the south side thereof, and these platforms being frequently used by the public, and the usual speed of the cars at this point being twenty miles per hour.<sup>58</sup> A verdict in plaintiff's favor in an action against

along the street must drive upon the track. *Greeley v. Federal St. & P. V. Pass. Co.*, 153 Pa. St. 218, 25 Atl. 796.

When he saw that a wagon on which plaintiff was riding was not able to get off the track in time to avoid a collision; the wagon having been in his view for some time. *Toledo Consol. St. Ry. Co. v. Rohner* (Ohio C. C.), 6 O. C. D. 706.

In a collision on an ascending grade, the horse, buggy, and occupants collided with were carried 100 feet. *Gress v. Braddock & H. St. Ry. Co.*, 14 Pa. Super. Ct. 87.

The speed was twice that allowed by law, and he failed to apply the brake in time to avoid collision with a child crossing the street thirty-five feet away. *Huerzler v. Central Crosstown R. Co.*, 1 Misc. Rep. (N. Y.) 136, 48 St. Rep. (N. Y.) 649, 20 N. Y. Supp. 676; affd., 139 N. Y. 490.

A rule of the company requiring cars approaching a car discharging

passengers to slow up was violated, and a passenger who alighted from a motor car and passed around its rear was struck, the car colliding with him being concealed from his view and approaching at full speed. *Dobert v. Troy City R. Co.*, 91 Hun (N. Y.), 28, 36 N. Y. Supp. 105, 71 St. Rep. (N. Y.) 392.

The wagon with which the car collided was broken up, and the adjacent grounds and plank in the street torn up. *Strauss v. Newburgh E. R. Co.*, 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998.

57. *Callahan v. Phila. Tract. Co.*, 184 Pa. St. 425, 39 Atl. 222, 41 W. N. C. 509; *Saunders v. City & S. R. Co.*, 99 Tenn. 130, 41 S. W. 1031, 2 Chic. L. J. Wkly. 522; *Fonda v. St. Paul City R. Co.*, 71 Minn. 438, 74 N. W. 166; *South Covington & C. St. R. Co. v. Beatty*, 20 Ky. L. Rep. 1845, 50 S. W. 239, 6 Am. Neg. Rep. 75.

58. *Walker v. St. Paul City Ry. Co.*, 81 Minn. 404, 84 N. W. 222, 51 L. R. A. 632.

a trolley company for running over a boy, on the ground that the car was run at an excessive rate of speed, will be set aside where the evidence as to the high rate of speed is vague and unsatisfactory, and the evidence as to a proper rate of speed is supported by the fact that the car was stopped within a few feet after the motorman discovered the boy's peril.<sup>59</sup> A witness who is not an expert may testify whether a trolley car was running fast or slow at the time of an accident.<sup>60</sup> He cannot testify that he saw a car "coming down at a terrible speed," as it conveys to the jury no measurement of the rate of the speed of the car, except that it was at such rate as the witness disapproved.<sup>61</sup> The New York Railroad Law, authorizing municipalities to enact such reasonable ordinances regulating the rate of speed as they may deem necessary, limits the power so that a city will be enjoined at the suit of a railroad company from enforcing a penal ordinance or regulation of its common council limiting the speed of street cars in the city streets to six miles an hour, if it appear that such a speed was a detriment to the company and to its service to the public; that the streets are wide, level, and comparatively straight, and that for several years no accident has

59. *Graham v. Consol. Tract. Co.* (N. J. Sup.), 44 Atl. 964. A special finding by a jury in an action for injury to plaintiff's wife to the effect that she was injured by being thrown out of a buggy because plaintiff's horse was frightened by defendant's car approaching a long covered bridge from around a curve 800 feet distant therefrom at the rate of twelve miles an hour, and that the place was such as would be likely to frighten a horse of ordinary gentleness; also that the motorman en-

deavored to stop the car as soon as he saw the horse's fright, and did so at a point 90 or 100 feet from the bridge, and 84 feet from where plaintiff's wife was thrown out, contradicts a general verdict finding the company guilty of negligence. *Marion City Ry. Co. v. Dubois*, 23 Ind. App. 342, 55 N. E. 266.

60. *Ehrmann v. Nassau El. R. Co.*, 23 App. Div. (N. Y.) 21.

61. *Chicago City Ry. Co. v. Wall*, 93 Ill. App. 411.

occurred from cars running through them at the rate of twelve miles an hour.<sup>62</sup> In 1879, the New York Court of Appeals determined that a street car drawn by horses upon a public street may not move over the rails at a rate of speed faster than that ordinarily reached by horses drawing loads of passengers, while the motive power is under such control as easily to be slackened in speed and quickly stopped entirely; so that others may also use the track, without risk of harm, if all concerned are ordinarily prudent and careful.<sup>63</sup> At the present time it would seem that such a rate of speed for an electric or cable car would be unreasonably slow; but even now, in crowded streets, the motive power must be kept under such control as "easily to be slackened in speed and quickly stopped entirely." Where it is charged that the negligence of the railroad company in propelling its cars at an excessive rate of speed was the cause of the injury, defendant's witnesses, testifying to the rate of speed, may be asked as to the distance between the places through which the car was to pass and between which the injury was occasioned, and the schedule time for that length of run.<sup>64</sup>

**§ 19. Frightening animals.**— Street railroad companies are bound to regard the rights of others in the use of the public streets, yet they are not liable for accidents arising from fright to horses caused by the usual operation of its road, if its employees are free from negligence; and this must be determined from the facts and circumstances in the case.<sup>65</sup>

62. Union Tract. Co. v. Water-vliet, 35 Misc. Rep. (N. Y.) 392, 71 N. Y. Supp. 977.

63. Adolph v. C. P., N. & E. R. R. Co., 76 N. Y. 530.

64. Cook v. Los Angeles & P.

EI. Ry. Co., 66 Pac. 306, 23 Am. & Eng. R. Cas. 69.

65. Wachtel v. East St. Louis, etc., E. R. Co., 77 Ill. App. 465; North Side St. R. Co. v. Tippins (Tex. App.), 3 Am. Electl. Cas.

A motorman is not negligent in ringing the gong on his car in a public street a half dozen or a dozen times so as to render the company liable for personal injuries resulting from the fright of a horse caused thereby, where there was nothing in the behavior of the horse prior to the accident indicating it was frightened.<sup>66</sup> But if he sees that a horse is frightened and injury imminent, it is his duty to refrain from sounding his gong and to stop the car; to continue to sound it under such circumstances would be such willful misconduct as would render the company liable for resulting injury.<sup>67</sup> He is not chargeable with negligence in failing to stop or slacken the speed of his car upon discovering that a horse approaching from the opposite direction is frightened, unless

489, 14 S. W. 1067; *Eastwood v. La Crosse City R. Co.*, 94 Wis. 163, 68 N. W. 651. In the case last cited, it was held that an inference of negligence is not justified from the motorman's failure to stop the car upon seeing that a gentle team about 175 feet in advance, driven by a full-grown man, was beginning to prance, where the team was on a well-traveled road at the side of the track, nearly sixteen feet in width, and was in perfect safety, and there is no evidence that it seemed to be beyond the driver's control. *Molyneux v. S. W. Missouri El. R. Co.*, 81 Mo. App. 25; *Myers v. Branford St. R. Co. (Canada)*, 27 Ont. App. 513. If it appear that the plaintiff's horse became frightened and backed upon the track when a motor car was 75 to 100 feet away, and the plaintiff signaled the car to stop or slacken speed, and the motorman was looking in another direction and did not slow up un-

til the collision, a verdict in plaintiff's favor will not be disturbed. *Geipel v. Steinway R. Co.*, 14 App. Div. (N. Y.) 551, 43 N. Y. Supp. 934.

66. *Henderson v. Greenfield & T. F. St. R. Co.*, 172 Mass. 542, 52 N. E. 1080; *East St. Louis, etc., Ry. Co. v. Wachtel*, 63 Ill. App. 181; *Chapman v. Zanesville St. R. Co. (C. P.)*, 27 Ohio L. J. 70; *North Side St. R. Co. v. Tippins (Tex. App.)*, 14 S. W. 1065; *Steiner v. Phila. Tract. Co.*, 134 Pa. St. 199, 2 Am. R. & Corp. Rep. 435, 19 Atl. 491.

67. *Galesburg El., etc., Co. v. Manville*, 6 Am. Electl. Cas. 476, 61 Ill. App. 490; *Lightcap v. Phila. Tract. Co. (C. C. E. D. Pa.)*, 60 Fed. 212. If a motorman in charge of an electric car, coming suddenly upon a woman and a little boy with a horse and buggy, in the narrow limits of a public street, obstructed with building material, instead of slackening his speed,

the circumstances indicate that the horse will be uncontrollable if the car approaches, and that the driver or the persons with him are in imminent peril.<sup>68</sup> If however the horse appears to him to be refractory, he must manage the car in such a way as to relieve the driver from his dilemma.<sup>69</sup>

run by them, sounding the gong without ceasing and thereby the horse takes fright and runs away injuring the woman and the property, the street car company is liable. Springfield Consol. Ry. Co. v. Ankron, 93 Ill. App. 655.

68. Terre Haute El. R. Co. v. Yant, 21 Ind. App. 486, 51 N. E. 732, 1 Repr. 181; Chapman v. Zanesville St. R. Co., 27 Ohio L. J. 70; Coughtry v. Willamette St. R. Co., 21 Oreg. 245, 27 Pac. 1031; Cornell v. Detroit El. R. Co., 82 Mich. 495, 46 N. W. 791; Doster v. Charlotte R. Co., 117 N. C. 461, 34 L. R. A. 481, 23 S. E. 449; Steiner v. Phila. Tract. Co., 134 Pa. St. 199, 19 Atl. 491; Flaherty v. Harrison, 98 Wis. 559, 10 Am. & Eng. R. Cas. (N. S.) 176, 74 N. W. 360.

69. Citizens' St. R. Co. v. Lowe (Ind. App.), 5 Am. Electl. Cas. 436; Kankakee El. R. Co. v. Lade, id. 431, 56 Ill. App. 454; Hair v. Citizens' Ry. Co. (Tex. Civ. App.), 6 Am. Electl. Cas. 589, 32 S. W. 1050; Benjamin v. Holyoke St. R. Co., 4 Am. Electl. Cas. 517, 160 Mass. 3; Ellis v. Lynn & Boston Ry. Co., 4 Am. Electl. Cas. 531, 160 Mass. 341, 35 N. E. 1127. In the case last cited, it is said, regarding the duties of the motorman: "It is his duty, if he sees a horse in the street before him that is greatly frightened by the car, so as to

endanger his driver or other persons in the street, to do what he can in the management of his car to diminish the fear of the horse; and it is also his duty in running the car to look out to see, whether by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. In this way the convenience and safety of everybody may be promoted without serious detriment to anybody. Of course, the owners and drivers of horses are required at the same time to use care in proportion to the danger to which they are exposed." Flewelyn v. Lewiston & A. H. R. Co., 89 Me. 585, 36 Atl. 1056; Waechter v. Second Ave. Tract. Co., 198 Pa. St. 129, 47 Atl. 967; Lines v. Winnipeg El. St. R. Co., 11 Manitoba, 77. In Nebraska, it was held that the use of a steam engine on a street railroad, on a street constantly filled with persons on horseback, and buggies, wagons, and carriages, and which men, women, and children used for business, pleasure, or recreation, renders the street railroad company liable for negligence resulting in the frightening of a horse and injury to the driver, even if the charter of the company authorized it to use steam power. Lincoln R. T. Co. v. Nichols, 37 Nebr.

The poles of a trolley line may be so placed in the street as to amount to an unlawful obstruction, in view of the fact that animals are likely to be frightened by the passing of the electric cars and to shy, causing the vehicles being drawn by them to collide with the poles.<sup>70</sup> The car itself may have something upon it unusual, as where it has a sprinkler attached upon which waving black coats are hung, then the company must take reasonable care to prevent frightening horses thereby, if the car be operated with knowledge that the unusual things are there.<sup>71</sup> In any case, the one claiming to recover against the railroad company must establish to the satisfaction of the jury that in the light of all the circumstances the motorman had not acted as a person of ordinary prudence would have acted.<sup>72</sup> An electric street car is not

332, 56 Am. & Eng. R. Cas. 584,  
55 N. W. 872, 20 L. R. A. 853;  
Muncie St. R. Co. v. Maynard, 5  
Ind. App. 372, 32 N. E. 343.

In Georgia however it seems that the use of a dummy engine on a street railroad is not necessarily negligent; and that a street railroad company is not liable where an accident is caused by the sudden backward movement of the car on a reversal of the engine at about the same moment that the conductor caused the brake to be taken off, which some unauthorized person had applied to the car, neither the conductor nor the engineer knowing what the other was about to do, and when the wagon with which the car collided was brought upon the track by the sudden fright of the team, caused by the backing of the train. Rome St. R. Co. v. McGinnis, 94 Ga. 229, 21 S. E. 707.

70. Cleveland v. Bangor St. R.

Co., 4 Am. Electl. Cas. 398, 86 Me. 232, 29 Atl. 1005.

71. McCann v. Consol. Tract. Co., 59 N. J. L. (30 Vroom) 481, 38 L. R. A. 236, 7 Am. & Eng. R. Cas. (N. S.) 280, 36 Atl. 888. If in operating a car a loud and unusual noise is produced, the company is not liable for injuries caused by a horse which took fright thereby, unless it be shown that the noise was unnecessary as well as unusual. Hill v. Rome St. R. Co., 101 Ga. 66, 28 S. E. 631. A street cardriver may be deemed negligent in swinging his team directly across the street at right angles to the car, immediately in front of an approaching vehicle, without looking and listening, if thereby the team become frightened and run away. Sutter v. Omnibus Cable Co., 107 Cal. 360, 40 Pac. 484.

72. Klatt v. Houston El. St. Ry. Co. (Tex. Civ. App.), 57 S. W.

such a defect or object within the limits of a highway calculated to frighten horses of ordinary gentleness as will render the company liable for injuries due to the fright of a horse thereby;<sup>73</sup> and running without unnecessary noise made for the purpose of scaring the animal, if a mule become frightened and runs away it does not make the company liable for the resulting damages.<sup>74</sup> The driver of a team is not guilty of negligence as matter of law in driving on a street occupied by an electric railroad causing noise calculated to frighten horses, particularly young horses, though the space between the track and the retaining wall is narrow; nor is he negligent as matter of law for not turning up a side street when he sees his horses showing fright at an approaching car.<sup>75</sup> But if he knows his horse is unaccustomed

1112. A motorman who stops his car to allow a funeral procession to pass and starts it again before all the wagons in the procession have passed, may be deemed negligent if thereby a horse attached to one of the wagons becomes frightened and backs the wagon in front of the car. Richter v. Cicero & P. St. R. Co., 70 Ill. App. 196. Where one claims his horse took fright and ran away, being struck by a piece of snow or ice thrown from the sweeper of a street railroad company, he must furnish positive proof that the piece of snow or ice came from the sweeper, and also that the sweeper was defective in design or operated negligently. Connor v. Met. St. R. Co., 48 App. Div. (N. Y.) 580, 63 N. Y. Supp. 509.

73. Bishop v. Bell City St. R. Co., 92 Wis. 139, 65 N. W. 733. If the cars are negligently allowed

to stand on a bridge in the public highway, evidence that other horses had become frightened at seeing them standing at the same place where plaintiff's horse took fright is competent. San Antonio E. Co. v. Beyer (Tex. Civ. App.), 57 S. W. 851.

74. Doster v. Charlotte St. R. Co., 117 N. C. 651, 23 S. E. 449. In the case cited, the court held, that the company was not liable unless the motorman saw the frightened horse upon the track in front of him, or ought to have reasonably presumed that the frightened horse was likely to come on the track and collide with the car.

75. Flewelyn v. Lewiston & A. H. R. Co., 89 Me. 585, 36 Atl. 1056; Gibbons v. Wilkes-Barre & S. St. R. Co., 155 Pa. St. 279, 26 Atl. 417, 56 Am. & Eng. R. Cas. 600.

to electric cars, and knowing the dangers of such a course, for the purpose of testing the animal, he drives him where he knows electric cars will be met, he is guilty of contributory negligence, which will prevent his recovery against the railroad company for injuries sustained by his horse taking fright at the cars.<sup>76</sup> The mere failure however to look for approaching cars by one driving along the street in which there is an electric street railroad will not prevent recovery for injuries sustained by the horse being frightened by an overtaking car and springing to one side.<sup>77</sup>

**§ 20. Collision with steam train.**—The legislature has power, and in nearly every State it has used the power, to permit an electric street railway company to cross a steam railroad at grade without providing for compensation for injury to the railroad company.<sup>78</sup> The right of way of steam railroads at crossings is subject to the public easement, and the operation of an electric street railway imposes no new burden; and even without an act of the legislature, if the street railroad company be authorized to occupy the street, it could cross the steam railroad tracks at grade.<sup>79</sup> The high rate of speed and the dangerous character of steam trains run over crossings necessitate that such trains should have the right of way, to

76. Cornell v. Detroit El. Ry. Co., 3 Am. Electl. Cas. 486, 82 Mich. 495, 46 N. W. 791, 46 Am. & Eng. R. Cas. 201.

77. Benjamin v. Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95.

78. N. Y., etc., R. Co. v. Bridgeport Tract. Co., 5 Am. Electl. Cas. 246, 65 Conn. 410, 32 Atl. 953; Del., etc., R. Co. v. Wilkes-Barre, etc., Ry. Co., 4 Am. Electl. Cas. 237, 6 Kulp (Pa.), 342. The New York Rail-

road Law, as to ascertaining the compensation to be paid when two railroads intersect, applies to the crossing of a steam railroad by an electric street railroad. Port Richmond, etc., R. Co. v. Staten Island Ry. Co., 4 Am. Electl. Cas. 239, 71 Hun (N. Y.), 179, 24 N. Y. Supp. 566.

79. Chicago, etc., Ry. Co. v. Whiting, etc., Ry. Co., 5 Am. Electl. Cas. 236, 139 Ind. 297, 38 N. E. 604.

be exercised in accordance with the requirements of law, and imposes the duty upon the public, in the use of the highway, as the railroad crossing is approached, to stop, look, and listen, in order that the right of the railroad may be safely accorded to it. But there is nothing in the right which otherwise limits the use of the highway by the public, or restricts the increase of the volume of that use, either in the manner originally exercised or through conveniences which invention may from time to time provide. It follows from the conclusion that the use of the street by the electric car, as it is now usually operated, is within the purposes for which the highway was created, that such car is not to be excluded from the point in that highway where the railroad may cross it. The persons controlling the car, like other passers in the street, must conform with the requirements which the railroad right imposes — stopping, if necessary, looking, listening, and yielding the right of way.<sup>80</sup> Of course, where flagmen or other guards are kept at steam railroad crossings, it cannot be maintained that it is negligence, as matter of law, if the persons operating a street car,

80. *West Jersey R. Co. v. Camden, etc., Ry. Co.*, 5 Am. Electl. Cas. 137, 145, 52 N. J. Eq. 31, 29 Atl. 423. A motorman operating a car over the same road for nearly two years prior to the accident, familiar with the use to which steam railroad tracks has been put for that time, namely, for switching purposes, who, upon rounding a curve 750 feet from the crossing, while his car was traveling at the rate of twelve miles an hour, saw a train standing 315 feet from the crossing and continued at the same rate of speed

until within 100 or 125 feet, when he discovered that the train was backing toward the crossing and that a collision was likely to occur, and thereupon reversed his power and put on the brake of his car, but was unable, because of the defective condition of the brakes, to prevent the collision, is contributorily negligent and cannot recover against the steam railroad company for injuries caused to himself in the accident. *Einsfeld v. Niagara Junction Ry. Co.*, 49 App. Div. (N. Y.) 470, 63 N. Y. Supp. 563.

approaching the crossing, fail to look and listen.<sup>81</sup> But in Pennsylvania it has been held, that the driver of a street car must stop, look, and listen, without regard to the action of a flagman, if he have other sources of information which would lead a prudent man to infer that there was danger to be apprehended from an approaching train.<sup>82</sup> The fact that a street-cardriver has been directed by the company to obey the signal of a flagman employed by the steam railroad company at a railroad crossing and governs the movement of his car accordingly at that place, does not convert the flagman into an agent of the street railroad company so as to make the latter responsible for his negligence.<sup>83</sup> The crossing of two railroads, where the cars thereon are propelled by steam or electricity, presents a situation of danger calling for the exercise of the highest degree of care and prudence upon the part of the persons charged with the operation and management of cars, engines, or trains, and no motorman or engineer has any right to approach a crossing, under circumstances indicating danger of collision, without having his motor or engine under perfect control.<sup>84</sup> When a street railway company is constructing its road in accordance with its charter powers, over a location designated by municipal authority, and using or intending to use the safeguards pre-

81. Richmond v. Chicago & West Mich. Ry. Co., 87 Mich. 374, 10 Ry. & Corp. L. J. 334, 49 N. W. 641.

82. Philadelphia & Reading R. Co. v. Boyer, 97 Pa. St. 91.

83. Chicago St. R. Co. v. Volk, 45 Ill. 175.

84. Einsfeld v. Niagara Junction Ry. Co., 49 App. Div. (N. Y.) 470, 63 N. Y. Supp. 563. A steam

railroad company is liable for injuries inflicted, through its negligence, on a street car passenger, by a collision with the street car, though the accident would not have happened but for the contributing negligence of the employees of the street railway company. Chicago & E. I. R. Co. v. Hines, 183 Ill. 482, 56 N. E. 177.

scribed by statute, the court cannot, under its general equity jurisdiction, compel it to use other or different safeguards.<sup>85</sup>

**§ 21. Collision with other car.**—Where two street cars meet in a head-end collision on a single track, in the absence of other evidence, negligence must be assumed.<sup>86</sup> If however the collision is between cars operated by separate companies and at the intersection of two separate railroad tracks, there is no presumption of negligence which may be relied upon, unless the plaintiff was a passenger upon one of the cars, in which case the presumption is applicable against the street railroad company which was his carrier.<sup>87</sup> In the absence of any right of precedence, by usage or otherwise, cars of different companies at the intersection of street railway tracks stand on a footing of equality, each lawfully using the public street and each owing to the other the duty of exercising reasonable care while doing so.<sup>88</sup> A gripman or motorman is not relieved of the duty to exercise care and caution to avoid a threatened collision with a car approaching on an

85. Old Colony R. Co. v. Rockland & A. St. Ry. Co., 5 Am. Electl. Cas. 233, 161 Mass. 416, 37 N. E. 370.

86. Peterson v. Seattle Tract. Co. (Wash.), 63 Pac. 539; affd. on rehearing, 65 id. 543; West Chicago St. R. Co. v. Annis, 62 Ill. App. 180.

87. Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988. The rule *res ipsa loquitur* applies to a case where a street car collides with another which is being shifted at the foot of a descending grade at the terminus of a road, and the tracks are covered with snow. Kay v. Met. St. R. Co., 29 App.

Div. (N. Y.) 466, 51 N. Y. Supp. 724; revd., 163 N. Y. 147. A street car company cannot avoid liability for the neglect of its duty to a passenger of another company whose line crosses its own, because the other company was also neglectful of its duty. It owes however to such passenger the duty only of using ordinary care. O'Rourke v. Lindell R. Co., 142 Mo. 342, 9 Am. & Eng. R. Cas. (N. S.) 675, 44 S. W. 254. And see Taylor v. Grand Ave. R. Co., 137 Mo. 363, 39 S. W. 88.

88. Met. St. R. Co. v. Kennedy (C. C. App. 2d C.), 51 U. S. App. 503, 82 Fed. 158.

intersecting line, although he has been signaled to proceed by a watchman at the crossing, employed by the companies jointly.<sup>89</sup> If, in obedience to a municipal ordinance, he has made a stop required at a street intersection and attempts to cross when an approaching car on the other railway has not yet made the stop required of it, he is not guilty of contributory negligence if the other car fails to stop and he is injured in colliding with it.<sup>90</sup> Great care is required of two street railroads running within a few feet of each other, particularly if one company uses a motive power different from that of the other. For example, the one a cable power, the other animals.<sup>91</sup> But the carrier company cannot be held liable for injury to a small child, who, in the custody of an adult, was put off at their proper stopping place while a car was approaching on a parallel track, and who ran against the side of the approaching car.<sup>92</sup> An employee upon a street car and in control of the motive power who may be at fault in his relation to his employers or to other persons upon the highway, will not be precluded from recovering for an injury occasioned by a collision with a car coming in on an intersecting track and striking his car from the rear, if his negligence was not contributory to the accident and its effect had ceased and a condition of affairs quite disconnected from his act existed at the time of the collision.<sup>93</sup>

89. *Taylor v. Grand Ave. R. Co.*, 137 Mo. 363, 39 S. W. 88.

90. *Becker v. Detroit Citizens' St. Ry. Co.* (Mich.), 80 N. W. 581.

91. *West Chicago St. R. Co. v. Yund*, 68 Ill. App. 609; *affd.*, 169 Ill. 47, 48 N. E. 208.

92. *Schneidau v. New Orleans & C. R. Co.*, 48 La. Ann. 866, 19 So. 918.

93. Plaintiff was driving his car up the Bowery in New York, upon a track used jointly by the Second Avenue Railroad Company, his employer, and by the defendant, and approached Grand street prepared to turn eastwardly upon the tracks on that street — his regular route. The approach of a Grand street car upon the intersecting

§ 22. Collision with animals, or other vehicles.—The driver of a vehicle in a public street traversed by a street railway is bound to take notice of the conditions. He knows that the street cars run in grooved tracks, and it is therefore impossible for the driver or motorman to turn out to avoid collision with an object on the track; that the only means of avoiding collision is by stopping the car, and that this cannot be done instantly. It is therefore negligence for the driver of a carriage to suddenly turn directly in front of an approaching car, whether the car be coming from the direction in which he is driving or from the rear. In the absence of something to excuse the performance of that duty, it is incumbent upon the driver of such a vehicle, before attempting to turn across the track, to take proper means of ascertaining whether the way is clear, and this is especially true of an attempt to turn across the track in the middle of a block, or at any place other than a regular crossing.<sup>94</sup> It is none the

track which he intended to use caused him to stop when on the spur connecting the Bowery track with the Grand street track, with the rear of his car overhanging the Bowery track. The Grand street car passed in front of him, stopped, discharged and received many passengers, and had started when the defendant's car, approaching from the rear on the Bowery track, crashed into the overhanging rear platform of the plaintiff's car with considerable force, and he was injured. *Tyler v. Third Ave. R. Co.*, 18 Misc. Rep. (N. Y.) 165, 41 N. Y. Supp. 523.

94. *Fritz v. Detroit Citizens' St. Ry. Co.* (Mich.), 5 Am. Electl. Cas. 480, 483; *McManigal v. South Side Pass. R. Co.*, 181 Pa. St. 358, 37

Atl. 516; *North Side St. R. Co. v. Want* (Tex.), 15 S. W. 40.

It is the duty of the motorman in seeing a vehicle crossing the track seventy or eighty feet away to check the speed of the car, and if necessary to stop it to avoid a collision, irrespective of the question whether or not the plaintiff's intestate was guilty of contributory negligence. But the testimony may justify the jury in finding that the motorman did not exercise the care and caution which he ought to have exercised in preventing the collision. If he might have stopped the car and prevented the collision after he saw the vehicle about to cross the car tracks in front of him, the negligence of the defendant may have been established to the

less his duty to observe such car because his load and position upon it are such as to make it inconvenient to take such precaution;<sup>95</sup> or because his view is so obstructed by other things that he can only see twenty-five feet of the track, and there is so much noise that the car or its signals cannot be heard.<sup>96</sup> In view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them unnecessarily, and to turn to one side when they meet them; but, subject to that, and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision. Neither has the right to assume that the other will keep out of the way at its peril, although the electric car has a right to demand that the wagon shall not obstruct it by unreasonable delay upon the

satisfaction of the jury. It certainly would be his duty to check the speed of the car and stop it in order to avoid a collision, irrespective of the question whether or not the driver of the vehicle was guilty of contributory negligence. *Bruss v. Met. St. R. Co.*, 66 App. Div. (N. Y.) 554; *Lawson v. Met. St. R. Co.*, 40 id. 307, 57 N. Y. Supp. 997; *affd.*, 166 N. Y. 589; *Kennedy v. Third Ave. R. Co.*, 31 App. Div. (N. Y.) 30, 52 N. Y. Supp. 551.

95. *Blakeslee v. Consol. St. Ry. Co.* (Mich.), 5 Am. Electl. Cas. 486; *Kennedy v. St. Paul City Ry. Co.* (Minn.), *id.* 492; *Hickey v. St. Paul City Ry. Co.* (Minn.), *id.* 494.

96. *Omslaer v. Pittsb. & B. Tract. Co.*, 5 Am. Electl. Cas. 568, 168 Pa. St. 519, 32 Atl. 50; *Van Patten v. Schenectady St. Ry. Co.*, 5 Am. Electl. Cas. 520, 80 Hun (N. Y.), 494. He is not guilty however of negli-

gence as matter of law, in assuming that he could drive twenty-eight feet to cross the track before a car approaching him and 500 feet away could reach him. *Mackie v. Brooklyn City R. Co.*, 5 Am. Electl. Cas. 528, 10 Misc. Rep. (N. Y.) 4, 30 N. Y. Supp. 539. And see *Decker v. Brooklyn Heights R. Co.*, 64 App. Div. (N. Y.) 430; *Zimmerman v. Union Ry. Co.*, 6 Am. Electl. Cas. 527, 72 N. Y. Supp. 229, 3 App. Div. (N. Y.) 219; *Brozek v. Steinway Ry. Co.*, 6 Am. Electl. Cas. 512, 10 App. Div. (N. Y.) 360, 41 N. Y. Supp. 1017. And see *McCormack v. Nassau El. R. Co.*, 16 App. Div. (N. Y.) 24, 44 N. Y. Supp. 684; *Lenkner v. Citizens' Tract. Co.*, 179 Pa. St. 486, 36 Atl. 228, 28 Pittsb. L. J. (N. S.) 11; *Schron v. Staten Island El. R. Co.*, 16 App. Div. (N. Y.) 111, 45 N. Y. Supp. 124.

track. If the driver of the wagon did not know of the close proximity of the car, and the motorman saw the wagon and saw that the driver was proceeding in the ordinary way around an obstacle and clearing the track with reasonable speed, a jury might find that due care required the motorman to move slowly, or stop, until the plaintiff was out of the way.<sup>97</sup> The driver has the right to expect that the street car will be managed with reasonable care and a proper regard for the rights of others lawfully using the street; he may therefore drive along the track in full view of a car approaching from the rear, and the fact that he so proceeds for any distance will not charge him with contributory negligence in case of a collision, if, under all the circumstances, his conduct was consistent with ordinary prudence.<sup>98</sup> The obligation of each — the driver and the one in charge of the motive power of the car — is to use that degree of care which a person of ordinary prudence acting under similar circumstances would use; but it is not correct to say that they are both bound to use the same degree of care and the same degree of prudence, because the circumstances might

97. White v. Worcester Consol. St. R. Co. (Mass.), 6 Am. Electl. Cas. 498, 499; Camden, etc., Ry. Co. v. Preston (N. J. App.), id. 523; Seifter v. Brooklyn H. R. Co., 55 App. Div. (N. Y.) 10, 66 N. Y. Supp. 1107; revd., 169 N. Y. 254; Reid v. Met. St. R. Co., 58 App. Div. (N. Y.) 87, 68 N. Y. Supp. 539; Saffer v. Westchester El. R. Co., 22 Misc. Rep. (N. Y.) 555, 49 N. Y. Supp. 998; Mason v. Met. St. Ry. Co., 30 Misc. Rep. (N. Y.) 108, 61 N. Y. Supp. 789; Reiss v. Met. St. Ry. Co., 28 Misc. Rep. (N. Y.) 198, 58 N. Y. Supp. 1024;

Lefkowitz v. Met. St. Ry. Co., 26 Misc. Rep. (N. Y.) 787, 56 N. Y. Supp. 215; McKelvey v. Twenty-third St. R. Co., 5 Misc. Rep. (N. Y.) 424, 26 N. Y. Supp. 711; Petri v. Third Ave. R. Co., 30 Misc. Rep. (N. Y.) 254, 63 N. Y. Supp. 315.

98. Cohen v. Met. St. R. Co., 34 Misc. Rep. (N. Y.) 186, 68 N. Y. Supp. 830; Flannagan v. St. Paul City R. Co., 68 Minn. 300, 71 N. W. 379; Montgomery v. Johnson (Ky.), 58 S. W. 476, 22 Ky. L. Rep. 596.

require the driver of the vehicle to be extremely careful and the motorman to exercise ordinary care, or *vice versa*.<sup>99</sup> If both exercise a judgment upon the question whether or not a collision will occur and each is mistaken, then there is mutual negligence which will avoid a recovery.<sup>1</sup> But if the wagon is left standing so near to the track that it is apparent a car cannot possibly clear it, and the cardriver wantonly runs against it, the company will be liable for the injury, notwithstanding the prior negligence of the driver of the wagon.<sup>2</sup> The street car company having its car in perfect condition, suitably equipped, operated with the use of proper signals at a lawful rate of speed, by a motorman keeping a sharp lookout, is not chargeable with negligence because of inability to stop the car in time to prevent a collision with the vehicle of one who suddenly drove on the track.<sup>3</sup> One who leaves a horse unattended on a dark, stormy night, in a narrow space between a street railroad track and the street gutter, where a car with a headlight was liable to approach at any moment at a rapid rate of speed, cannot recover in case of a collision.<sup>4</sup> Where a wagon collided with

99. Reardon v. Third Ave. R. Co., 24 App. Div. (N. Y.) 163, 48 N. Y. Supp. 1005.

1. As where one drove across a street car track and stopped, as he believed, entirely out of the way of the street car, and the side fender of the passing car struck and injured his wagon; it appearing that the driver of the car also thought a collision could be avoided. Spaulding v. Jarvis, 32 Hun (N. Y.), 621.

2. Koch v. St. Paul City R. Co., 45 Minn. 407, 48 N. W. 191.

3. Cawley v. La Crosse City Ry.

Co., 101 Wis. 145, 77 N. W. 179, 12 Am. & Eng. R. Cas. (N. S.) 453; Lee v. Schuylkill Valley Tract. Co. (C. P. Pa.), 13 Mont. Co. L. Rep. 91; Omaha St. Ry. Co. v. Duvall, 5 Am. Electl. Cas. 502, 40 Nebr. 29, 58 N. W. 531.

4. Hoffman v. Syracuse R. T. Ry. Co., 50 App. Div. (N. Y.) 83, 63 N. Y. Supp. 442. And see McCambley v. Staten Isl. M. R. Co., 32 App. Div. (N. Y.) 346, 52 N. Y. Supp. 849. Or where the injury is caused by the sudden backing of the wagon into the car. Higgins v. Wilmington City R. Co.,

a horse car lawfully running upon its track and a person injured thereby recovers damages of the railroad company, the latter may recover from the owner of the wagon for the wrongful invasion of its road; and its damages are not measured by the judgment recovered against it by the passenger.<sup>5</sup> A dog is not a trespasser in a highway, nor upon a street car track which is laid in the highway on the same level with it.<sup>6</sup> A motorman must use the care of a prudent person to prevent running over him with his car; he cannot rely upon the celerity of the dog.<sup>7</sup> For a motorman, seeing dogs on the track ahead of his car, and high banks of snow on either side so that the dogs could get off only at certain cuts in the snow, to run down and kill one of the dogs, making no effort at all to stop the car which was going ten or twelve miles an hour, is clearly a wrongful and negligent act.<sup>8</sup> But where there is no proof of negligence on the part of the railroad company other than the fact that the car was proceeding at an unusual rate of speed and a dog got under the car and was killed in some unexplained way, the owner cannot recover his value in an action against the railroad company.<sup>9</sup>

1. Marv. (Del.) 352, 41 Atl. 86; Gilmore v. Federal St., etc., R. Co., 153 Pa. St. 31, 25 Atl. 651, 31 W. N. C. 507, 23 Pittsb. L. J. (N. S.) 438; Winter v. Federal St., etc., R. Co., 4 Am. Electl. Cas. 498, 153 Pa. St. 26, 19 L. R. A. 232, 25 Atl. 1028, 31 W. N. C. 565, 23 Pittsb. L. J. (N. S.) 302; Coughtry v. Willamette St. R. Co., 21 Oreg. 245, 27 Pac. 1031.

5. Chicago West Div. R. Co. v. Rend, 6 Ill. App. 243.

6. Citizens' R. T. Co. v. Dew,

100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518.

7. Dew Case, *supra*; Furness v. Union R. Co. (C. P. Pa.), 4 Pa. Dist. 784, 8 Kulp (Pa.), 103, 1 Lack. Leg. N. (Pa.) 332; West Chicago St. R. Co. v. Klecka, 94 Ill. App. 346.

8. Meisch v. Rochester El. St. R. Co., 4 Am. Electl. Cas. 520, 72 Hun (N. Y.), 604, 55 St. Rep. (N. Y.) 146, 25 N. Y. Supp. 214.

9. Dettmers v. Brooklyn H. R. Co., 22 App. Div. (N. Y.) 488, 48 N. Y. Supp. 23.

§ 23. Collision with persons on or near track.—It is the duty of the person controlling the motive power of a street car which is overtaking another vehicle directly in line with its progress and a possible obstacle in its way, to exercise care that the car may be brought to a standstill, if necessary, before reaching such vehicle.<sup>10</sup> One approaching to cross the track at a sufficient distance from a car so that he has reasonable ground to suppose that he may cross in safety may assume that the servant in charge of the car will give him a reasonable opportunity to cross.<sup>11</sup> And a pedestrian or a driver of a vehicle seeing a car approaching at what to him seems to be a safe distance to allow him to cross, has a right to assume that the car will be controlled, or at least that its speed will be so slackened, as to give him time to cross. Whether or not in attempting to cross he is guilty of negli-

10. Consol. Tract. Co. v. Hait, 59 N. J. L. (30 Vroom) 577, 37 Atl. 135; Baltimore Tract. Co. v. Appel, 80 Md. 603, 31 Atl. 964; Fishbach v. Steinway Ry. Co., 11 App. Div. (N. Y.) 152, 42 N. Y. Supp. 883; Kessler v. Brooklyn Heights R. Co., 3 App. Div. (N. Y.) 426, 38 N. Y. Supp. 799; Cline v. Crescent City R. Co., 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 So. 122; McGrane v. Flushing, etc., R. Co., 13 App. Div. (N. Y.) 177, 43 N. Y. Supp. 385; Brachfeld v. Third Ave. R. Co., 29 Misc. Rep. (N. Y.) 586, 60 N. Y. Supp. 988. A street car company is not liable for the death of one lying near the track, in a sparsely-settled locality, not a crossing, in a street not lighted nor used for travel, there being a ditch on each side of the car track, although the motorman saw the ob-

ject lying on the track about sixty-five feet ahead, at 10 o'clock at night, which he and the passengers standing beside him thought to be a dog; he at once having applied the brakes and sounded the gong, and on approaching a little nearer reversed, but could not stop the car until it ran upon and killed the man. The motorman saw the object as soon as it was possible to see it from his position, under the circumstances. Stelk v. McNulta (U. S. C. C. A. Ill.), 99 Fed. 138, 40 C. C. A. 357. And see Kramer v. New Orleans City & L. R. Co., 51 La. Ann. 1689, 26 So. 411; McKeon v. Steinway R. Co., 20 App. Div. (N. Y.) 601, 47 N. Y. Supp. 374.

11. Lawson v. Met. St. R. Co., 40 App. Div. (N. Y.) 307, 57 N. Y. Supp. 997.

gence is, as a general proposition, a question of fact to be determined by the jury; and it is only where it clearly appears from the uncontradicted evidence that he has by his own act contributed to the injury he has received, that the court is justified in determining that question as one of law.<sup>12</sup> Where the driver of a carriage on a street car track knows that a car is approaching from behind, or is about to collide with his carriage, it is his duty to do all he can to avoid the collision; and it is no excuse that his back is to the approaching car.<sup>13</sup> He is not excused from the duty of keeping a lookout

12. Cohen v. Met. St. R. Co., 63 App. Div. (N. Y.) 165, 71 N. Y. Supp. 268; Doyle v. West End St. Ry. Co., 5 Am. Electl. Cas. 459, 161 Mass. 533, 37 N. E. 741. In the case last cited it appeared that the city ordinance required cars to be stopped upon an appearance of danger; and the plaintiff was standing upon the track of an electric street railroad in front of an approaching car. It was held that to some extent the motorman would have the right to assume that he would hear the gong and take some other position; but that the whole question was one for the jury. Kostuch v. St. Paul City Ry. Co. (Minn.), 81 N. W. 215. He may assume that the car is furnished with appliances to reduce speed and to stop, and that it will not continue to run in violation of the law limiting the speed. Consol. Tract. Co. v. Lambertson, 59 N. J. L. (30 Vroom) 297, 36 Atl. 100; affd., 38 Atl. 683. One is not, as matter of law, negligent in running upon an electric railway track fifty feet in front of an electric car, run-

ning at the rate of six miles an hour, when necessary to get around another vehicle. Blakeslee v. Consol. St. R. Co., 112 Mich. 63, 70 N. W. 408, 29 Chic. Leg. N. 257, 3 Det. Leg. N. 844.

13. McCann v. N. Y. & Q. C. R. Co., 56 App. Div. (N. Y.) 419, 67 N. Y. Supp. 748; Devine v. Brooklyn H. R. Co., 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 626; Johnson v. Brooklyn H. R. Co., 34 App. Div. (N. Y.) 271, 54 N. Y. Supp. 547; Siek v. Toledo Consol. St. R. Co., 16 Ohio C. C. 393, 9 O. C. D. 51; Maxwell v. Wilmington City Ry. Co., 1 Marv. (Del.) 199, 40 Atl. 945; North Chicago St. R. Co. v. Zeiger, 78 Ill. App. 463; affd., 182 Ill. 9, 54 N. E. 1006; Thoresen v. La Crosse City R. Co., 94 Wis. 129, 6 Am. & Eng. R. Cas. (N. S.) 101, 68 N. W. 548; Cass v. Third Ave. R. Co., 20 App. Div. (N. Y.) 591, 49 N. Y. Supp. 356. When within 100 feet of his destination, a driver of a grocery wagon looked back, but discovering no approaching car, he stopped to deliver goods, and the car collided

for cars approaching from behind because he looked before entering the track and saw no car, and had reasonable ground to suppose that there would be no car which would find it necessary to pass along the track where he was driving. Nor is he excused because he is in a covered carriage.<sup>14</sup> Proceeding eastwardly, he is not negligent in turning upon the west-bound track in order to avoid cars approaching on the east-bound track — the space between the latter track and the curbstone being occupied by a standing wagon; nor is he negligent in continuing upon the west-bound track while the necessity for so doing continues.<sup>15</sup> The ordinary driver,

with his wagon. *Held*, he was not guilty of contributory negligence as matter of law, because he stopped without looking, where it was not clear that the street was wide enough to permit the vehicle to stand between the curb and the railroad and permit a car to pass. *Black v. Staten Isl. El. Ry. Co.*, 40 App. Div. (N. Y.) 238, 57 N. Y. Supp. 1112. An expressman may unload his wagon, although it is necessary to overlap street car tracks, and the motor-man who attempts to pass without giving him a reasonable time or any notice is negligent. *Holzman v. Met. St. R. Co.*, 31 Misc. Rep. (N. Y.) 644, 64 N. Y. Supp. 1120.

<sup>14</sup> *Siek v. Toledo Consol. St. R. Co.*, 16 Ohio C. C. 393, 9 O. C. D. 51. But the complaint cannot be dismissed in an action to recover damages for injuries sustained, where a covered wagon is overturned by a street car approaching from the rear without warning. *Warren v. Union R. Co.*, 46 App. Div. (N. Y.) 517, 61

N. Y. Supp. 1009; *Schilling v. Met. St. R. Co.*, 47 App. Div. (N. Y.) 500, 62 N. Y. Supp. 403.

<sup>15</sup> *Murphy v. Nassau El. R. Co.*, 19 App. Div. (N. Y.) 583, 45 N. Y. Supp. 283. And see *Cannon v. Pittsburg & B. Tract. Co.*, 194 Pa. St. 159, 4 Atl. 1089; *Hunter v. Third Ave. R. Co.* (Sup. Ct. App. Term, N. Y.), 21 Misc. Rep. (N. Y.) 1, 46 N. Y. Supp. 1010.

It appeared that plaintiff was driving a wagon southerly along a street in Brooklyn on the right track of a trolley railroad operated by defendant; just before reaching a point opposite a store on the left side of the street at which he delivered some goods, he proceeded to cross the left track at a slow walk until only the hind wheels of the wagon were in line with the right track, when the wagon was struck by a car, plaintiff was thrown to the ground and injured. The distance of the car from him at the time he reached the left track was estimated to be from 75 to 200 feet. *Held*, error to dismiss the com-

it may be said, has the right of way in crossing a street car track in advance of an approaching car, if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so stationed, he has sufficient time, proceeding reasonably, to clear the track without retarding the movement of the car, if its rate of speed is lawful; or, in the absence of a statute or ordinance fixing the rate of speed, if it be reasonable; and if it turn out that he has miscalculated, he is not chargeable with want of ordinary care or with violating any rights of the railroad company if it is compelled to retard the car, or even stop it, to enable such person to cross the track.<sup>16</sup> If however it appear to him that the rate of speed of the car is unreasonable or unlawful, he should take that fact into consideration in determining the probability of his being able to clear the track and avoid collision.<sup>17</sup> A

plaint in an action to recover damages for his injuries sustained in the collision. Meyer v. Brooklyn, etc., R. Co., 47 App. Div. (N. Y.) 286, 62 N. Y. Supp. 33. It is too a question for the jury upon a case showing that the injury occurred by a collision caused by the driver's attempt to cross the tracks when the car was a block distant and the wheel of the wagon caught in the track. Ludecke v. Met. St. R. Co., 32 Misc. Rep. (N. Y.) 635, 66 N. Y. Supp. 483.

16. Tesch v. Milwaukee El. Ry. Co., 108 Wis. 593, 84 N. W. 823; Blate v. Third Ave. R. Co., 44 App. Div. (N. Y.) 163, 60 N. Y. Supp. 732.

17. Tesch Case, *supra*. Seeing a street car approaching 250 feet away and driving on the track in front of it for a considerable dis-

tance, making no attempt to observe its approach, is a negligent act. Pechesky v. Met. St. R. Co., 30 Misc. Rep. (N. Y.) 432, 62 N. Y. Supp. 478. And see Hill v. Met. St. R. Co., 30 Misc. Rep. (N. Y.) 440, 62 N. Y. Supp. 596; Schausten v. Toledo Consol. St. R. Co., 18 Ohio C. C. 691. It is not as matter of law negligence to drive so close to a street railway track that a car approaching from the rear strikes the wagon, where the driver looked in the direction from which the car approached shortly before, and the car was not in sight, and she knew that she would be in sight of a motorman approaching from behind for more than half a mile; that the cars ran only each half hour, and the portion of the roadway which was macadamized and used by the

pedestrian who stands near a car track at night, upon a frequented thoroughfare, giving no indication of an intention to cross, and does not attempt to cross until a rapidly moving car is so near him as to render it practically impossible to prevent a collision, cannot recover damages for the injuries sustained.<sup>18</sup> Neither is the company liable for injury to the

public was comparatively narrow. *Manor v. Bay City's Consol. R. Co.*, 118 Mich. 1, 76 N. W. 139, 5 Det. Leg. N. 420. If there be plenty of room outside there is no justification however for one to drive with the wheels of his vehicle in one track of the railroad. *Glazebrook v. West End St. R. Co.*, 160 Mass. 239, 35 N. E. 553. And see *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283, 35 Pac. 920.

A higher degree of care is required in crossing the tracks of an electric street railroad than if the cars thereon were drawn by horses. *Hawthorne v. Cincinnati St. R. Co.*, 2 Ohio Dec. 548; *Winter v. Federal St., etc., R. Co.*, 153 Pa. St. 26, 19 L. R. A. 232, 25 Atl. 1028. The driver of a street car, who instead of keeping his team under control on approaching a crossing at which there are two women with babies in their arms and four children, whom he could have seen at a distance of fifty feet, increases the speed of his horses and runs over one of the children while crossing the track in the same direction in which she had been going, cannot be held to be free from negligence as matter of law. *Wihnyk v. Second Ave. R. Co.*, 14 App. Div. (N. Y.) 515, 43 N. Y. Supp. 1023.

18. *Knoker v. Canal & C. R. Co.*, 52 La. Ann. 806, 27 So. 279. An intelligent eleven-year-old boy, standing at night on the off side of a down-town track of a street railroad waiting for a car to pass on the up-town track, is negligent in stepping on the down-town track twelve or fifteen feet in front of an approaching down-town car without looking. He cannot recover for injuries sustained by being struck after he had tripped and fallen. *O'Rourke v. New Orleans City & L. R. Co.*, 51 La. Ann. 755, 25 So. 323. One standing in a large crowd so near a street railroad track as to be hit by a passing car cannot recover for his injuries sustained, where his failure to hear the approach of the car is due, not to the negligence of the company, but to the crowd; nor is the company negligent because it did not stop the running of its trains for the crowd, when the track was unobstructed, merely because the crowd was near the track. *Washington & G. R. Co. v. Wright*, 7 App. D. C. 295, 23 Wash. L. Rep. 844, 28 Chic. Leg. N. 155. A street railroad company cannot be held liable for the death of a person who, on a clear night, steps behind a cable car going in one direction in front of another.

driver of a wagon who suddenly steps backward on the track, although the presence of the wagon on the street imposes the duty upon its servants managing the street car colliding with the driver to proceed with caution.<sup>19</sup> In an action to recover for personal injuries against a street railroad company, based upon the negligence of its servants in operating a street car, the question is generally one of fact; and the defendant's negligence is to be determined in the light of all the circumstances. Therefore care should be taken in instructing the jury not to limit their consideration of this question of the defendant's negligence to any one or more circumstances.<sup>20</sup>

going in the opposite direction, that other having a bright head-light and being visible for a long distance, although it was proceeding at a high speed and the gripman had seen the person standing at the side of the track engaged in conversation, and had then turned his head away. Scott v. Third Ave. R. Co., 41 St. Rep. (N. Y.) 152, 16 N. Y. Supp. 350, 19 Wash. L. Rep. 827. But where the posts of an elevated road in the streets compelled a woman to stand within two feet of the defendant's tracks in order to see the cars approaching her street crossing, and the fender upon a car coming very rapidly and without ringing a bell caught her by the clothes and threw her down, injuring her, a fair question as to the negligence of the defendant and her contributory negligence is presented for the jury. G'Sell v. Met. St. Ry. Co., 35 Misc. Rep. (N. Y.) 387, 71 N. Y. Supp. 1020.

19. Gunn v. Union R. Co. (R. I.), 47 Atl. 888. And see Bailey v. Market St. Cable R. Co., 110

Cal. 320, 42 Pac. 914. No negligence upon the part of the defendant is shown where it appeared that plaintiff, attempting to cross street car tracks, passed behind one car and in front of another going in the opposite direction, which was then about twenty-five feet from her. She then stepped back off the track and noticed a truck going in the opposite direction, which was then almost on her; the motorman did not stop the car, although he saw the plaintiff, since there was nothing to charge him with notice that she was in a dangerous position after she stepped back from the track; the front of the car, apparently, passed the plaintiff without striking her. Mulligan v. Third Ave. R. Co., 61 App. Div. (N. Y.) 214, 70 N. Y. Supp. 530.

20. Plaintiff was driving about 8 o'clock in the evening, when it was not yet quite dark, with other young people, in an ordinary express wagon, passing over an uncovered bridge 300 feet long, on a street in the city of Cohoes spanning

§ 24. Collision with workmen upon street.— The rules of law applicable to persons crossing steam or street railways, or driving upon street railway tracks, do not apply either to municipal or other employees necessarily at work upon the street between or near the tracks. A street sweeper employed in the public service cannot exercise the same care while in the street as an ordinary pedestrian can, but is bound

the south branch of the Mohawk river. There was a roadway 16.5 feet wide for cars, and teams and a girder truss upon each side of the roadway; there was a car track on the northerly side; the roadway for teams was eight feet and one and one-fifth inches, the running board of the car projected southerly beyond the railroad sixteen and one-half inches, the width of the wagon from hub to hub, outside to outside, was five feet seven inches; on the roadway, close to the framework on the southerly side was a guard-rail six inches wide, four inches high; if the rims of the south wheels of the wagon were in contact with this guard-rail, there would then be a space of eleven and one-fifth inches between the northerly hub of the wagon and the southerly edge of the running-board of the car. While crossing the bridge a car of the defendant came up behind the wagon and attempted to pass by; in doing so, the running-board on the southerly side of the car collided with the hub of the northerly hind wheel of the wagon; the wagon was suddenly pushed forward about three feet and plaintiff thrown out. The court left

it to the jury to say whether or not in itself it was a negligent act on the part of the defendant's employees to attempt to pass the wagon, considering the narrowness of the bridge. It then charged that if the car could have safely passed had the horse and wagon continued on the same course they were proceeding, then it was not negligence for the car to be propelled at a reasonable speed as it approached the wagon; nor was it negligence, under those circumstances, to attempt to pass the wagon. The instruction was held upon appeal to be erroneous, since it excluded from consideration the fact of the slight margin between the car and the wagon and the great risk there might be of the horse swerving or lurching, as the testimony showed it did, toward the track; and allowed the jury to think that the defendant had the right to assume that the horse would not, by the noise of the car approaching or other customary noises, be startled or frightened in a way to swerve the wagon toward the track. *Reilly v. Troy City Ry. Co.*, 32 App. Div. (N. Y.) 131, 52 N. Y. Supp. 611.

to use reasonable care to avoid being run over.<sup>21</sup> An employee of a city, engaged in laying water pipes under the tracks of a street railroad, is lawfully in a trench dug for that purpose, since the consent of the city to the occupancy of a portion of the street by the railroad company does not destroy its right to repair or construct public works.<sup>22</sup> A

21. Smith v. Bailey, 14 App. Div. (N. Y.) 283; 43 N. Y. Supp. 856; Dipaolo v. Third Ave. R. Co., 55 App. Div. (N. Y.) 566, 67 N. Y. Supp. 421; O'Connor v. Union Ry. Co., 67 App. Div. (N. Y.) 99. In the case first cited it appeared that the sweeper was injured by jumping back from a carriage against the shaft of the defendant's cart. The court charged, in his action to recover for the injuries, that he must show freedom from any negligence, and that the negligence was entirely the defendant's. *Held*, error; that plaintiff was only required to show freedom from negligence which contributed proximately to the result. Brick v. Met. St. R. Co., 35 Misc. Rep. (N. Y.) 135, 71 N. Y. Supp. 314. Where the driver of a car proceeded upon the signal of the foreman of a contractor engaged in laying sewer pipes in a trench, under the supposition that the pipes had been properly placed a sufficient distance from the track to allow his car to pass without hitting, the company was held not liable for an injury sustained by colliding with a piece of pipe which fell into the trench and injured the plaintiff. The court said: "A careful man is guided by a reasonable estimate of probabilities. His precaution is

measured by that which appears likely in the usual course of things. The rule does not require him to use every possible precaution to avoid injury to others. He is only required to use such reasonable precautions to prevent accidents as would ordinarily be adopted by careful, prudent persons, under like circumstances. He was not bound to measure the distance and make sure that his car would not hit the pipe." Schmidt v. Steinway & H. B. R. Co., 132 N. Y. 566, 43 St. Rep. (N. Y.) 683, 30 N. E. 389. But see McKeown v. Cincinnati St. R. Co., 2 Ohio Leg. N. 388.

22. Owens v. People's Pass. R. Co., 155 Pa. St. 334, 26 Atl. 744, 32 W. N. C. 313. An employee of a gas company, engaged in laying gas pipes in a trench along side a street railway track, is as much bound to the observance of ordinary care to avoid injury from a street car as any traveler. Young v. Citizens' St. Ry. Co., 148 Ind. 54, 47 N. E. 142. And see 44 N. E. 927. The railroad company owes no greater duty to the employee of a contractor doing work under the tracks of a cable road than it does to any other person in the street. Floettl v. Third Ave. R. Co., 10 App. Div. (N. Y.) 308, 41 N. Y. Supp. 792, 75 St.

municipal employee engaged in the repairing of a street, carrying hot asphalt upon a shovel from the side of the railway track and placing it between the rails thereof, is engaged

Rep. (N. Y.) 1191. One who knowing and appreciating a danger, voluntarily assumes the risk of it, has not, if injured, a just ground of complaint. *Kinsley v. Platt*, 148 N. Y. 372, 42 N. E. 986; *Miller v. Grieme*, 53 App. Div. (N. Y.) 276, 65 N. Y. Supp. 813. So a bricklayer in the employment of a corporation, engaged in laying conduit pipes for electric wires along the line of a street railroad, in a trench about four feet deep and extending partially under the railroad tracks, who instinctively placed one of his hands upon the track while a car was passing over him, which he did not discover until it had partially passed over the trench, and was thus injured, cannot recover against the railroad company; and the speed of the car was held not important on the question of the company's negligence; also held that the testimony of plaintiff's co-employees to the effect that they did not hear the gong sounded, and of the plaintiff himself that it was not rung, was not sufficient to carry the case to the jury as against the testimony of the motorman and conductor of the car and two others, one of them a passenger, to the effect that the gong was sounded while the car was passing over the trench. *Nolan v. Met. St. R. Co.*, 65 App. Div. (N. Y.) 184. A workman standing in an open trench under a horse car track was killed while attempting to avoid a horse which

stepped into the trench by a car from which the horse was detached and which was allowed to go over the trench by its own momentum. *Held*, in an action against the railroad company to recover for his death, that the questions were for the jury. *Burns v. Second Ave. R. Co.*, 21 App. Div. (N. Y.) 521. Plaintiff was engaged with others in pushing an iron beam, extending from the street to a building being constructed, up out of the way. On the approach of defendant's street car, he raised his hand and called the driver to stop; the latter looked at him and took hold of the brake-handle; plaintiff then turned to his work; the car passed rapidly, struck the beam, which plaintiff testified was not more than about an inch from the side of the car, and injured the plaintiff. *Held*, that his negligence was a question for the jury. *Weingarten v. Met. St. Ry. Co.*, 62 App. Div. (N. Y.) 364, 70 N. Y. Supp. 1113. A workman is negligent who, knowing that cars are constantly passing, attempts to work in a space between the track and a pile of building material too narrow to permit the cars to pass without colliding with him, and takes no precautions for his safety, but relies upon the driver's watchfulness and the car stopping in time to enable him to escape injury. *Ferguson v. Phila. Tract. Co.*, 9 Pa. Co. Ct. 147, 47 Leg. Intel. 223.

in the performance of a duty which requires him to be as long as possible near or between the rails.<sup>23</sup> So is one engaged in taking tar in a bucket from a vat near by where it was heated and pouring it hot into the cracks between the stones composing a street pavement adjacent to the rails of a street railroad company, compelled to get his head down to within about two feet from the track in order to see that the tar entered the cracks and did not overflow.<sup>24</sup> A steam railroad flagman, temporarily stationed at a street crossing where a gate had broken down and obliged to stand in a narrow space between the steam railroad track and the horse car track,<sup>25</sup> one at work near the car track digging a ditch in the street for highway purposes and prevented from hearing a car by other noises,<sup>26</sup> these and others engaged in work which required them, in the intervals between the moving cars, to be upon the track and remain thereon many times until the car comes very close to them, are not required, like travelers upon the street, to look and listen. Of course they must

23. *Bengivenga v. Brooklyn Heights Ry. Co.*, 48 App. Div. (N. Y.) 515, 62 N. Y. Supp. 912. And see *Anselment v. Daniell*, 4 Misc. Rep. (N. Y.) 144, 53 St. Rep. (N. Y.) 133, 23 N. Y. Supp. 875.

24. *Lewis v. Binghamton R. Co.*, 35 App. Div. (N. Y.) 12, 54 N. Y. Supp. 452. One stooping down to adjust a plank over an excavation next to a street railway track, without looking for an approaching car, is guilty of such contributory negligence as will prevent a recovery for an injury from collision with the car. *Hafner v. St. Paul City R. Co.*, 73 Minn. 252, 75 N. W. 1048. And see *Eddy v. Cedar Rapids & M. R. Co.*, 98

Iowa, 626, 67 N. W. 676. A foreman of a gang engaged in opening a drain between the tracks of a trolley railroad is not necessarily negligent in attempting to remove a plank, one end of which was on the track, while a car was approaching; especially where the car had stopped some distance away and he did not know that it was moving toward him. *Morrissey v. Westchester El. R. Co.*, 18 App. Div. (N. Y.) 67, 45 N. Y. Supp. 444.

25. *D'Oro v. Atlantic Ave. R. Co.*, 37 St. Rep. (N. Y.) 411, 13 N. Y. Supp. 789.

26. *Little v. Grand Rapids St. R. Co.*, 78 Mich. 205, 44 N. W. 137.

exercise reasonable care to keep out of the way of the cars; but the conditions surrounding them are such that the persons operating the cars are required to exercise extreme care to protect them and to give them abundant warning of a car's approach. The car is also required to be under such control as that it can be stopped practically upon the instant.<sup>27</sup> Where an action is brought to recover damages resulting

27. See cases above cited; Pittsb. El. R. Co. v. Kelley, 57 Kan. 514, 46 Pac. 945. One killed by the contributory negligence of the company's employees while on the track of an elevated road, either as an employee of a contractor with whom the company had contracted, or as a licensee seeking work from such contractor, is entitled to the same degree of care and vigilance on the part of the company as if he were actually employed on the tracks. Wells v. Brooklyn Heights R. Co., 34 Misc. Rep. (N. Y.) 44, 68 N. Y. Supp. 305. A street cardriver who sends his car at the rate of six miles an hour past a trench into which pipes have been in process of lowering for several days, close to the track, and which is so dangerous that a watchman has been placed on guard by the street railroad company to see that there are no obstructions, while the watchman is temporarily absent, without looking for obstructions, is so negligent that the company will be liable to a workman struck by a pipe whirled about by the step of the car coming into collision with its end. Lahey v. Central Park, N. & E. R. R. Co., 51

St. Rep. (N. Y.) 589, 22 N. Y. Supp. 380, 2 Misc. Rep. (N. Y.) 537. One who uses, controls, and manages an electric current of high destructive power in a place where it is reasonably probable that others must enter to work, owes to each person who so enters the duty to use reasonable care to maintain a proper insulation of such current. Anderson v. Jersey City El. L. Co. (N. J.), 43 Atl. 654, 6 Am. Neg. Rep. 314; Huber v. La Crosse City R. Co., 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583; Atlanta Consol. St. R. Co. v. Owings, 97 Ga. 663, 25 S. E. 377, 5 Am. & Eng. R. Cas. (N. S.) 1, 33 L. R. A. 798. It was held in Massachusetts that a person unlawfully engaged upon a street for a telegraph company which had not obtained a statutory license for locating its wires thereon, is so negligent that he cannot recover for an injury occasioned by negligence of a street railroad company. Banks v. Highland St. Ry. Co., 136 Mass. 485; Houston City St. Ry. Co. v. Woodlock (Tex. Civ. App.), 5 Am. Electl. Cas. 581. And see Laschinger v. St. Paul City Ry. Co. (Minn.), 87 N. W. 836.

from the death of a street sweeper, he having been struck by a rapidly approaching street car which gave no notice of its approach until it was within ten feet of him, it is competent to prove that from time to time, at intervals of a minute or so, he looked for the approach of cars upon the track upon which he was working, and that he was doing his work in the usual and proper way, and such proof is sufficient to warrant a finding that he exercised all the care that was required of him under the circumstances.<sup>27½</sup>

#### CONTRIBUTORY NEGLIGENCE.

**§ 25. Contributory negligence generally.**—One about to cross the track of a street surface railroad at a street crossing must exercise care proportionate to the danger to be avoided and the consequences which might result from want of care, according to the particular circumstances surrounding him; but he needs to use such caution only as may reasonably be expected of persons of ordinary prudence.<sup>28</sup> It will not do to say that a recovery can be defeated because of an omission to do what he ought to have done under the circumstances, which omission directly contributed to the accident.<sup>29</sup> Less care is required than in crossing steam railroads.<sup>30</sup> He is bound to look before entering upon the track, that is, he cannot heedlessly enter upon it.<sup>31</sup> One attempting to cross the

27½. O'Connor v. Union Ry. Co., 67 App. Div. (N. Y.) 99.

28. Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 35 Ohio L. J. 140, 43 N. E. 207, 32 L. R. A. 276; West Chicago St. R. Co. v. Dougherty, 89 Ill. App. 362; Chicago City R. Co. v. Fennimore, 78 id. 478, 3 Chic. L. J. Wkly. 520; Scannell v. Boston El. Ry. Co., 176 Mass. 170, 57 N. E. 341; Walsh v. Hestonville,

M. & F. Pass. R. Co., 194 Pa. St. 570, 45 Atl. 322; Ponsano v. St. Charles St. R. Co., 52 La. Ann. 245, 26 So. 820.

29. Roberts v. Spokane St. Ry. Co., 23 Wash. 325, 63 Pac. 506.

30. Orr v. Cedar Rapids & M. C. Ry. Co. (Iowa Sup.), 5 Am. Electl. Cas. 445.

31. Dummer v. Milwaukee El. Ry. & L. Co., 108 Wis. 589, 84

track at a point other than at a street crossing, immediately behind a moving car on the track nearest to him, is so negligent that he cannot recover for an injury in a collision with a car approaching from the opposite direction on the other

N. W. 853; *Watkins v. Union Tract. Co.*, 194 Pa. St. 564, 45 Atl. 521; *Citizens' R. Co. v. Holmes*, 19 Tex. Civ. App. 266, 46 S. W. 116; *Quinn v. Brooklyn City R. Co.*, 40 App. Div. (N. Y.) 608, 57 N. Y. Supp. 544; *McClelland v. Chippewa Val. El. Ry. Co. (Wis.)*, 85 N. W. 1018; *Snider v. New Orleans & C. R. Co.*, 48 La. Ann. I, 18 So. 695; *Newark Pass. R. Co. v. Bloch*, 4 Am. Electl. Cas. 523, 55 N. J. L. (2d Vroom) 605, 56 Am. & Eng. R. Cas. 590, 27 Atl. 1067, 22 L. R. A. 374; *Omaha St. Ry. Co. v. Loehneisen*, 40 Nebr. 37, 58 N. W. 535; *Canedo v. New Orleans & C. R. Co.*, 52 La. Ann. 2149, 28 So. 287; *McCawley v. Phila. Tract. Co.*, 13 Pa. Super. Ct. 354. A woman was held to be so negligent as to defeat a recovery, where in crossing a street covered with snow at a crosswalk on a highway, she was struck while midway of the tracks by a car approaching at its ordinary speed of fifteen to eighteen miles an hour, its gong being sounded and it having been in plain sight when she left the sidewalk, and she having looked in the direction from which it was coming just before she started to hurriedly cross the street. *Mathes v. Lowell, L. & H. St. Ry. Co.*, 177 Mass. 416, 59 N. E. 77. And see *Brown v. Pittsb., A. & M. Tract. Co.*, 14 Pa. Super. Ct. 594. Where it appeared that at 6 o'clock on a winter's morning the car

which struck the plaintiff's wagon was running on the down-town track going up town, without displaying a headlight or ringing a bell, or giving any special notice of its approach to a dangerous street intersection, and plaintiff's driver testified that he looked up the track, or "down the track, rather, toward Myrtle avenue, in the line, in fact, the car should be coming; and I didn't notice no car," and he then drove on over the crossing, the car striking his wagon near the rear end; it was held that he need not swear that he looked every instant of the time, or while passing over every foot of the ground, since it was not customary to find a car upon that track coming in that direction. *Stevens Co. v. Brooklyn Heights R. Co.*, 59 App. Div. (N. Y.) 23, 68 N. Y. Supp. 1088. And see *Cooke v. Baltimore Tract. Co.*, 80 Md. 551, 31 Atl. 327. Testimony of witnesses that they looked for an approaching car and did not see one, though one was in plain sight and so near as to render an attempt to cross the track dangerous, is inconsistent with all reasonable probabilities and is not sufficient to authorize a submission of an issue as to the near approach of the car as a disputed question of fact. *Stafford v. Chippewa Val. El. R. Co. (Wis.)*, 85 N. W. 1036. And see *Bornscheuer v. Consol. Tract. Co.*, 198 Pa. St. 332, 47 Atl.

track.<sup>32</sup> Driving in a carriage on the track, knowing that a car is approaching from behind and is about to collide with his carriage, it is his duty to do all he can to avoid the collision; and it is no excuse that his back is to the approaching car. He must drive off the track without loss of time.<sup>33</sup> If in a covered carriage and he does not know that a street car is approaching on the track whereon he is, and while he is turning into a cross-street, he is not negligent as matter of law if he fail to look behind him.<sup>34</sup> He need not anticipate

872; *McQuade v. Met. St. R. Co.*, 17 Misc. Rep. (N. Y.) 154, 39 N. Y. Supp. 335; *Curry v. Rochester R. Co.*, 90 Hun (N. Y.), 230, 70 St. Rep. (N. Y.) 146, 35 N. Y. Supp. 543. One has no right to turn suddenly in a covered wagon across a car track, away from a crossing, without assuring himself, by proper investigation, that a car is not coming. *Fritz v. Detroit Citizens' St. R. Co.*, 105 Mich. 50, 62 N. W. 1007, 2 Det. Leg. N. 19. Where his wagon is loaded with trunks piled in such a manner that his view in the direction from which the car is approaching is cut off, he is negligent if he suddenly turns upon the track, although he listens for the gong. *Roth v. Met. St. R. Co.*, 13 Misc. Rep. (N. Y.) 213, 68 St. Rep. (N. Y.) 113, 34 N. Y. Supp. 232.

Plaintiff, while driving along the track of an electric street railway, attempted to cross to a narrow passage on the other side constituting a temporary road around an excavation; he did not look for a car and knew that it was a dangerous place, and undertook to cross back, when the car was

within a few feet of his wagon; a collision resulted, which the motor-man did all in his power to prevent. *Held*, a recovery cannot be had. *Christensen v. Union Trunk Line (Wash.)*, 32 Pac. 1018. And see *Bailey v. Market St. Cable R. Co.*, 110 Cal. 320, 42 Pac. 914; *Meyer v. Brooklyn Heights R. Co.*, 6 Am. Electl. Cas. 540, 9 App. Div. (N. Y.) 79.

32. *Greengard v. St. Paul City R. Co.*, 72 Minn. 181, 75 N. W. 221.

33. *Morrissey v. Bridgeport Tract. Co.*, 68 Conn. 215, 35 Atl. 1126; *McCann v. N. Y. & Q. C. Ry. Co.*, 56 App. Div. (N. Y.) 419, 67 N. Y. Supp. 748; *N. Y. Condensed Milk Co. v. Nassau El. Ry. Co.*, 29 Misc. Rep. (N. Y.) 127, 60 N. Y. Supp. 234. One who voluntarily walks at night on a street railroad track, with full knowledge that the car may come up behind him at any moment, cannot recover damages for an injury if, by ordinary care, he might have learned of the approach of the car. *Smith v. Crescent City R. Co.*, 47 La. Ann. 733, 17 So. 302.

34. *Cohen v. M. St. Ry. Co.*, 34 Misc. Rep. (N. Y.) 186.

negligence on the part of those operating the railway.<sup>35</sup> So a passenger on one of the defendant's street cars alighting therefrom at a crossing, passing behind it to cross the other track, and when going on the track seeing a car approaching about fifty feet away which could have been stopped in twenty-five feet, has the right to assume from the distance of the car that it would be controlled or so slackened as to give him time to cross, and is not negligent as matter of law.<sup>36</sup> But one who starts to drive his team across a street but a short distance in front of a rapidly approaching car is so negligent that he cannot recover damages in case of a collision.<sup>37</sup> He must be entirely free from negligence con-

35. Schausten v. Toledo Consol. St. Ry. Co., 18 Ohio C. C. 691; Citizens' R. T. Co. v. Seigrist, 6 Am. Electl. Cas. 583, 96 Tenn. 119, 33 S. W. 920.

36. Cohen v. M. St. Ry. Co. (N. Y. Sup. Ct. App. Div.), 26 N. Y. L. J. 89; Lang v. Houston, W. S. & P. F. R. Co., 75 Hun (N. Y.), 151, 58 St. Rep. (N. Y.) 594, 27 N. Y. Supp. 90; Smith v. City & S. R. Co., 29 Oreg. 539, 546; 46 Pac. 136, 780, 5 Am. & Eng. R. Cas. (N. S.) 163. And see Schwarzbaum v. Third Ave. R. Co., 60 App. Div. (N. Y.) 274, 69 N. Y. Supp. 1095. But a person of mature age is negligent, as matter of law, if passing behind the one car, where the tracks are five feet apart, there is no obstacle preventing her from seeing the car with which she collided on the further track had she looked for it after the first car had passed. McCarthy v. Detroit Citizens' R. Co. (Mich.), 79 N. W. 631, 6 Det. Leg. N. 210.

37. Bornscheuer v. Consol. Tract. Co., 198 Pa. St. 332, 47 Atl. 872; Reid v. Met. St. R. Co., 58 App. Div. (N. Y.) 87, 68 N. Y. Supp. 539; Cincinnati St. Ry. Co. v. Jenkins, 20 Ohio C. C. 256, 11 O. C. D. 130; Hannon v. North Jersey St. Ry. Co. (N. J. Sup.), 47 Atl. 803; Schlitz v. Nassau El. R. Co., 44 App. Div. (N. Y.) 542, 60 N. Y. Supp. 822; Griffith v. Denver Consol. Tramway Co., 14 Colo. App. 504, 61 Pac. 46; Tyson v. Union Tract. Co. (Pa.), 48 Atl. 1078; Jager v. Coney Isl. & B. R. Co., 84 Hun (N. Y.), 307, 65 St. Rep. (N. Y.) 539, 32 N. Y. Supp. 304; Clancy v. Troy & L. R. Co., 88 Hun (N. Y.), 496, 34 N. Y. Supp. 877; Rohe v. Third Ave. R. Co., 10 Misc. Rep. (N. Y.) 740, 64 St. Rep. (N. Y.) 500, 31 N. Y. Supp. 797. But this rule that it is negligence to drive across a street railroad track in front of an approaching car cannot be rigidly applied where a vehicle is run into by a street car on a track crowded

tributing to the result.<sup>38</sup> If the car be, say 100 feet away and not approaching with unusual speed, he may perhaps assume that he can cross the track in front of it with safety. It would be for the jury to determine upon all the circumstances.<sup>39</sup> If he be driving along the track and a trolley car

with cars. *Kelley v. Brooklyn Heights R. Co.*, 12 Misc. Rep. (N. Y.) 568, 67 St. Rep. (N. Y.) 604, 33 N. Y. Supp. 851; *Hamilton v. Third Ave. R. Co.*, 6 Misc. Rep. (N. Y.) 382, 56 St. Rep. (N. Y.) 397, 26 N. Y. Supp. 754.

38. *Luedecke v. Met. St. Ry. Co.*, 60 N. Y. Supp. 999; *Lorickio v. Brooklyn H. R. Co.*, 44 App. Div. (N. Y.) 628, 60 N. Y. Supp. 247; *Boesen v. Chicago El. T. Co.*, 31 Chic. Leg. N. 371.

39. *Cass v. Third Ave. R. Co.*, 20 App. Div. (N. Y.) 591, 47 N. Y. Supp. 356; *Mackie v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 4, 62 St. Rep. (N. Y.) 653, 30 N. Y. Supp. 539; *Nicholsburg v. Second Ave. R. Co.*, 11 Misc. Rep. (N. Y.) 432, 37 N. Y. Supp. 130, 65 St. Rep. (N. Y.) 273; *Kerr v. Atl. Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 264, 63 St. Rep. (N. Y.) 310, 30 N. Y. Supp. 1070; *McNulta v. Norgren*, 90 Ill. App. 491; *Lowy v. N. St. Ry. Co.*, 30 Misc. Rep. (N. Y.) 775, 62 N. Y. Supp. 743; *Davidson v. Schuylkill Tract. Co.*, 4 Pa. Super. Ct. 86; *Schron v. Staten Isl. El. R. Co.*, 16 App. Div. (N. Y.) 111, 45 N. Y. Supp. 124; *Armsted v. Mendenhall* (Minn.), 85 N. W. 929; *Mowbray v. Brooklyn Heights R. Co.*, 59 App. Div. (N. Y.) 239, 69 N. Y. Supp. 435; *Lawson v. M. St. Ry. Co.*, 40 App. Div. (N. Y.) 307, 57 N. Y. Supp. 997; affd., 166 N. Y. 589, 59 N. E.

1124; *Citizens' R. T. Co. v. Seigrist*, 96 Tenn. 119, 33 S. W. 920; *Reiley v. Third Ave. R. Co.*, 16 Misc. Rep. (N. Y.) 11, 73 St. Rep. (N. Y.) 289, 37 N. Y. Supp. 593, affg. 14 Misc. Rep. (N. Y.) 445, 70 St. Rep. (N. Y.) 733, 35 N. Y. Supp. 1030; *Shanley v. Union R. Co.*, 14 Misc. Rep. (N. Y.) 442, 35 N. Y. Supp. 1030, 70 St. Rep. (N. Y.) 734; *Zimmerman v. Union R. Co.*, 3 App. Div. (N. Y.) 219, 38 N. Y. Supp. 362; *McDonald v. Third Ave. R. Co.*, 16 Misc. Rep. (N. Y.) 52, 37 N. Y. Supp. 639, 73 St. Rep. (N. Y.) 233.

It is useless to give the circumstances upon which different cases have been sent to the jury, except, perhaps, a few of them by way of illustration: In *Moran v. Detroit, Y. & A. A. Ry. Co.* (Mich.), 83 N. W. 606, 7 Det. Leg. N. 343, it appeared that the plaintiff turning in toward a street car track, looked both ways, and as he drew near the track to cross it he collided with a car, which was visible from forty to seventy rods from the point of collision. There was evidence that he did not go immediately on the track after looking, but drove eight or ten feet before he was struck.

The defendant, operating a double track electric street railway on a street running east and west, on the south side of which there was no sidewalk, built a crosswalk

approaches from the rear, he is not necessarily negligent, although his duty required him to turn off the tracks upon

from the north sidewalk, connecting with platforms on either side of its tracks, and put up a sign that the cars stopped there. Plaintiff and her escort, walking over this crosswalk in the nighttime to take a car on the south track, seeing the headlight of a car approaching on the south track at a distance estimated by them to be 700 feet, the escort ran ahead to the south platform and signaled the car; plaintiff followed at a brisk walk, watching the approaching car and supposing that it was slowing up; believing that she had ample time to cross in front of it, she continued across the south track and was struck and injured just as she reached the platform. The usual speed of cars at this point was twenty miles an hour, the car striking her ran forty-five miles an hour in passing the platform. She was not contributorily negligent as matter of law. *Walker v. St. Paul City Ry. Co.*, 81 Minn. 404, 51 L.R.A. 632, 84 N.W. 222.

After sundown, not quite dark, plaintiff was struck by a car as she was attempting to cross Third avenue at Ninety-fifth street, she then being near or upon the north crosswalk; when she approached the car tracks the car was coming down town upon the westerly track, followed by a truck; she stood near the track until both had passed her, then crossed the west track and became aware of a car coming up town upon the east track; she stood between the two tracks while another car from the

north passed down and the car from the south passed by; behind the car going north at a short distance, not precisely stated, was another car also going north; she appeared to see this before she attempted to cross the east track in front of it, but she was struck while crossing. The court said, in determining if the evidence were sufficient to sustain the verdict: "In examining questions of this kind, it must be remembered that foot passengers as well as horsemen and those who operate street cars have equally a lawful right to use the street for all proper purposes and at all proper places. It is quite true that street cars which run upon rails laid down in the street and cannot turn out, and which are large and heavy vehicles moved by machinery, necessarily have to a considerable extent the right of way, and it is the duty of pedestrians to use reasonable care to avoid them; but yet there is a corresponding duty on the part of the drivers of street cars, who must, in the exercise of due care, so control the speed of their cars and give such notice of the approach of their cars at places where pedestrians are using the streets that such pedestrians can avoid them in the exercise of proper care. This duty is all the more stringently to be insisted upon in the case of corporations like the defendant, whose cars are of great weight and are run at a comparatively high rate of speed, so that great care on the part of the gripman, as

well as on the part of pedestrians, is required to avoid serious, if not fatal, accidents." *Fandel v. Third Ave. R. Co.*, 15 App. Div. (N. Y.) 426, 44 N. Y. Supp. 462; *affd.*, 162 N. Y. 598, 57 N. E. 1110.

If a car approach a street crossing on a dark, rainy night, and the employees of the company managing the car fail to give notice by sounding gong or bell, the complaint in an action for injury to a pedestrian at such crossing cannot be dismissed, although the car only moved at an ordinary rate of speed. On a retrial it appeared that the plaintiff looked both ways for other cars, her intestate being in advance as they crossed behind the passing car, and intestate was struck and killed by a car moving rapidly on the second track. *Held*, a question for the jury as to whether he was negligent. *Schwarzbaum v. Third Ave. R. Co.*, 54 App. Div. (N. Y.) 164, 66 N. Y. Supp. 367, 69 id. 1095.

One driving a loaded truck on a south-bound track turned almost directly across the north-bound track and there the hind wheels or the part of the load projecting beyond them was struck by a north-bound street car; he testified that when he turned, another street car was in sight; others, that the car was from 75 to 200 feet distant when he reached the north-bound track. The case was held for the jury. *Meyer v. Brooklyn, Q. C. & S. R. Co.*, 47 App. Div. (N. Y.) 286, 62 N. Y. Supp. 33. And see *Morrow v. Del. Co. & P. El. Ry. Co. (Pa.)*, 48 Atl. 974.

A boy seven or eight years of age standing upon street railway tracks in plain sight of cars ap-

proaching upon them, waiting for cars to pass on the other track and struck by a car, giving no signal of its approach, is not necessarily negligent. *Griffiths v. M. St. R. Co.*, 63 App. Div. (N. Y.) 86, 71 N. Y. Supp. 406.

A milkman driving on a street car track at 5 o'clock in the morning, in November, in a covered wagon with two doors on the side, seated behind the doors, with cans piled before and behind him, a lantern inside the wagon but no light visible from the rear, was struck by a car and injured. Obstructions in the street compelled him to drive on the track; the motorman testified that the car was going twenty-five miles an hour and that he was asleep. *Held*, it was for the jury to say if the milkman was negligent. *Mapes v. Union R. Co.*, 56 App. Div. (N. Y.) 508, 67 N. Y. Supp. 358.

One is not guilty of contributory negligence in proceeding to drive across the tracks in advance of a car which he observes approaching 250 or 300 feet distant at the rate of from twelve to fifteen miles an hour, when he is only fifteen feet from the first track; and in an action for injuries if a collision result, the court may properly charge that he had "the right to assume that the car coming south would not be run in such a way as to endanger him. Every person who uses the street crossings has the right to assume that the people who are operating street cars are operating them with a due regard to the rights of others, and that they will exercise ordinary care and prudence in their operation. To that extent they have a right to

notice of the approach of the car; it would depend upon the circumstances surrounding.<sup>40</sup> As matter of law, he is negli-

rely upon the conduct of the people who are operating street cars." *Bertsch v. Met. St. R. Co.*, 68 App. Div. (N. Y.) 228.

40. *Camden, G. & W. R. Co. v. Preston*, 59 N. J. L. (30 Vroom) 264, 35 Atl. 1119; *McGrane v. Flushing & C. P. El. R. Co.*, 13 App. Div. (N. Y.) 117, 43 N. Y. Supp. 385; *Fishbach v. Steinway R. Co.*, 11 App. Div. (N. Y.) 152, 42 N. Y. Supp. 883; *Thatcher v. Central Tract. Co.*, 166 Pa. St. 66, 25 Pittsb. L. J. (N. S.) 321, 36 W. N. C. 84, 30 Atl. 1048; *Central Pass. R. Co. v. Chatterson*, 29 S. W. 18, 17 Ky. L. Rep. 5; *O'Neill v. Third Ave. R. Co.*, 3 Misc. Rep. (N. Y.) 521, 52 St. Rep. (N. Y.) 486, 23 N. Y. Supp. 20.

He who is prevented from driving farther on the right-hand track of an electric railway by an open manhole, and from turning to the right because of wagons blocking the street on that side, is not necessarily negligent in turning to the left across the other track, in front of a car approaching thereon some distance away. *Lenkner v. Citizens' Tract. Co.*, 179 Pa. St. 486, 36 Atl. 238, 28 Pittsb. L. J. (N. S.) 11.

Plaintiff's intestate was being driven in a track between a ditch and an electric street railway, after dark, at a walk, and he and the driver both kept looking for a car to approach from the rear; the last time they looked, the car was close upon them; the driver turned as soon as possible, but too late, because of the rate of speed at which

the car was running; and the intestate died from the injuries received in the collision. *Held*, not negligent as matter of law. *Rouse v. Detroit El. Ry.* (Mich.), 87 N. W. 68, 8 Det. Leg. N. 577; *Countryman v. F., J. & G. R. Co.*, 166 N. Y. 201, 59 N. E. 822. One is not necessarily negligent while standing between tracks, because he stepped back in front of an approaching car not seen to avoid a car coming upon the other track, by which he was unexpectedly confronted. *McCormick v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 8, 62 St. Rep. (N. Y.) 647, 30 N. Y. Supp. 529. And see *Conoly v. Trenton Pass. R. Co.*, 56 N. J. L. (27 Vroom) 700, 44 Am. St. Rep. 424, 29 Atl. 438.

The unconscious mismanagement, mistake, or mismovement of a motorman in manipulating the appliances to stop his car, after having reasonable ground to apprehend a collision, but for which the collision would not have occurred, does not render the company liable to a person injured thereby and negligent in failing to look out for a car, and in failing to get off the track after he discovered the car. *Lockwood v. Bell City St. R. Co.*, 92 Wis. 97, 65 N. W. 866. And see *Winter v. Crosstown St. Ry. Co.*, 5 Am. Electl. Cas. 515, 8 Misc. Rep. (N. Y.) 362; *Fishbach v. Steinway R. Co.*, 6 Am. Electl. Cas. 547, 11 App. Div. (N. Y.) 152.

The rule that a failure by the driver of a wagon on a street car

gent if he crosses the track when it is evident to him that he cannot pass in safety unless the motorman stops or slackens the speed of his approaching car.<sup>41</sup> Where the cars run at a high rate of speed and close together, or where the view is obstructed and there is much noise and confusion, reasonable care imposes a greater degree of caution upon travelers crossing the tracks than where the cars are run at less speed and farther apart, or where the view is open and the surroundings quiet.<sup>42</sup> A stranger to the locality, in possession

track to remove his wagon therefrom in time to avoid collision with a car approaching from his rear when, by looking to the rear he might have discovered the car in time to leave the track and avoid the collision, constituted contributory negligence, even though the motorman might, by the exercise of proper care, have avoided the collision, announced in the Winter Case, was held unsound in the Fishbach Case; and it was held in the latter case that no more stringent rule exists than that "the person driving in a car track must exercise reasonable care, and that is to be determined from a consideration of the obligations resting upon the operator of the car, the burden of use which general traffic imposes upon the street, and the rule that the car has a paramount, but not an exclusive right of way."

41. Williamson v. Met. St. Ry. Co., 29 Misc. Rep. (N. Y.) 324, 60 N. Y. Supp. 477; MacLeod v. Graven (C. C. App. 6th C.), 19 C. C. A. 616, 43 U. S. App. 129, 73 Fed. 627; Smith v. El. Tract. Co. (C. P.), 6 Pa. Dist. 471, 40 W. N. C. 486.

42. Brown v. Wilmington City Ry. Co., 1 Penn. (Del.) 332, 12 Am. & Eng. R. Cas. (N. S.) 439, 40 Atl. 936; R. F. Stevens Co. v. Brooklyn Heights R. Co., 59 App. Div. (N. Y.) 23, 68 N. Y. Supp. 1088. Crossing or using tracks of a cable or electric railroad, travelers should exercise more care to insure their safety than where the cars are drawn by horses. Winter v. Federal Street & P. V. R. Co., 153 Pa. St. 26, 19 L. R. A. 232, 23 Pitts. L. J. (N. S.) 302, 25 Atl. 1028, 31 W. N. C. 565; Ponsano v. St. Charles St. R. Co., 52 La. Ann. 245, 26 So. 820.

The driver of a loaded truck, upon the track of one electric street railroad, approaching the crossing thereof by another similar railway, knowing a car upon the same track is approaching him in the rear and that another is coming upon the intersecting track, cannot undertake to cross in front of the last-named car without negligence. If a collision result, he has taken his chances. Clancy v. Troy, etc., R. Co., 5 Am. Electl. Cas. 551, 88 Hun (N. Y.), 496.

There can be no recovery for

of all her faculties, and with nothing to obstruct her view or prevent her seeing or hearing a car, is negligent as matter of law if she be injured in attempting to cross a street without even observing the railway tracks in the street. The rule in such case is, that if the person have no actual knowledge of the danger which subsequently caused the injury, and could not, by the exercise of reasonable care, have discovered it, he cannot be said to be negligent. But, if ignorant of the danger and the exercise of reasonable care would have made it known, and there be a failure to exercise such care, he is chargeable with negligence to the same extent as though perfectly familiar with the location and the danger.<sup>43</sup> If the crossing be made in the middle of a block, on a dark night, and the traveler saw a car which appeared to him to be standing at the street intersection, he is not negligent, although the car started up and collided with him while crossing.<sup>44</sup> One is not necessarily negligent in continuing to descend, with a heavy load, a steep grade crossing a street railway, without fixing a lock chain to the wagon which breaks after the descent is begun.<sup>45</sup> Nor is it negligence, as matter of

the death of a person struck by, a street car who, knowing that cars pass frequently and that the nearest rail of the track was not more than ten inches from the hub of one of the wheels of his wagon, attempted to dismount by stepping on the hub nearest the track, with his back thereto, when the car was in plain sight, about fifty feet away, approaching at a fast rate. Crowley v. Met. St. Ry. Co., 24 App. Div. (N. Y.) 101, 48 N. Y. Supp. 863. A person who voluntarily touches a wire screen, heavily charged with electricity, for the purpose of demonstrating

to those who assert that it was charged that it was not charged, is negligent as matter of law. Wood v. Diamond El. Co., 185 Pa. St. 529, 39 Atl. 1111.

43. Russell v. Minneapolis St. Ry. Co. (Minn.), 86 N. W. 346.

44. Gildea v. Met. St. Ry. Co., 58 App. Div. (N. Y.) 528, 69 N. Y. Supp. 568; Rieglemann v. Third Ave. R. Co., 9 Misc. Rep. (N. Y.) 51, 59 St. Rep. (N. Y.) 667, 29 N. Y. Supp. 299; Kennedy v. St. Paul City R. Co., 59 Minn. 45, 60 N. W. 810.

45. Cross v. California St. Cable R. Co., 102 Cal. 313, 36 Pac. 673.

law, for one to drive along a street railroad track, seated in the center of a low cart immediately behind his horse so as to be unable to observe the upturned end of a rail forming part of the track; if however the rail is plainly visible for a great distance, say 150 feet, and should have been observed by him in the exercise of ordinary care, he is so negligent that he cannot recover for an injury caused by contact with the rail.<sup>46</sup> The sudden peril which would prevent an act otherwise negligent from being considered contributory negligence, does not apply to the case of a person who, attempting to escape impending peril from drays and wagons, throws himself in front of a moving street car whose owner and its servants are not guilty of negligence.<sup>47</sup> Indeed one may so foolishly, carelessly, and recklessly get upon a street railway track as to defeat his right to damages from the company for personal injuries caused by a collision, although the company was at fault in running the car against him.<sup>48</sup> Where one attempted to drive a wagon across the defendant's tracks, for the purpose of turning into an intersecting street, and was thrown from his seat into the street by reason of a collision between the wagon and a car upon defendant's tracks, which at the time he attempted to cross the tracks was upward of seventy feet away and could have been stopped in less than one-fifth of that distance, it cannot be said as matter of law that he was guilty of contributory negligence.<sup>48½</sup>

46. Bradwell v. Pittsb. & W. E. Pass. R. Co., 153 Pa. St. 105, 25 Atl. 623. And see Watson v. Brooklyn City R. Co., 14 Misc. Rep. (N. Y.) 405, 70 St. Rep. (N. Y.) 757, 35 N. Y. Supp. 1039.

47. Trowbridge v. Dewville St. R. Co. (Va.), 19 S. E. 780.

48. Redford v. Spokane St. R. Co., 9 Wash. 55, 36 Pac. 1085.  
48½. Bruss v. Met. St. Ry. Co., 66 App. Div. (N. Y.) 554. And see Smith v. Met. St. Ry. Co., 66 id. 600. Where the evidence given on the jury trial presents an issue of fact, the court has no power to

**§ 26. Rule to stop, look, and listen.**—The rule generally applied to the conduct of person crossing the tracks of steam railroads, that the omission of the plaintiff to "stop, look, and listen" before crossing the track is negligence, as matter of law, is only applicable to street railways where the attending conditions are such that reasonable care and prudence would dictate such precautions.<sup>49</sup> There is always the duty

direct a verdict for one of the parties on the theory that a verdict in favor of the other party would be set aside as against the weight of evidence. *Smith Case, supra*; *Wiard v. Syracuse R. T. Co.*, 52 App. Div. (N. Y.) 635; affd., 169 N. Y. .

49. *Tacoma Ry. & Power Co. v. Hays* (C. C. App. 9th C.), 110 Fed. 496, 23 Am. & Eng. R. Cas. (N. S.) 58. In the case cited the court said: "The duties of persons with respect to steam railways and street railways are not so analogous as to be governed at all times by the same rule. The rights of the persons are greater, and the dangers less, in connection with the latter; the rights of street cars, no matter by what power impelled, not being superior to those of other vehicles, save in the one instance where the vehicle is bound to get out of the way and not to obstruct the passage of the car, owing to the inability of the car to travel in any other part of the street. The element of trespass is entirely absent in the case of a person crossing a street railway at any point, and the only care required of him is that which a reasonably prudent man would exercise, having due regard to the rights of others, and

assuming that others (including the street car companies) will exercise the same care; in fact knowing that such care is imposed by municipal regulation upon the persons operating the street cars. This assumption of course does not warrant such a reliance upon it as to neglect means of self-preservation, but is an element of consideration in arriving at the standard of care to govern the particular case." And see *Traver v. Spokane St. Ry. Co.* (Wash.), 65 Pac. 284, 22 Am. & Eng. R. Cas. (N. S.) 759; *Patterson v. Townsend* (Iowa Sup. Ct.), 5 Am. Electl. Cas. 442; *Lewis v. Cincinnati St. Ry. Co.*, 10 Ohio S. & C. P. Dec. 53; *Trout v. Altoona & L. V. El. Ry. Co.*, 13 Pa. Super. Ct. 17.

Where it appeared that the plaintiff looked when within eighty feet of the street car track and ascertained that no car was within 300 or 350 feet of the crossing, and then drove on at the usual rate of speed of the cars (four to five miles an hour), his view being so obstructed by trees that he could not see a car coming until the fore feet of his horse were at the further rail of the street car track, and he, sitting on the seat of his wagon, was from two

to look for an approaching car, and, if the street is obstructed, to listen, and in some situations to stop, and a plaintiff must

to four feet from the nearer rail of the track, when he saw the car coming toward him ten or twelve feet away, at the rate of from ten to sixteen miles an hour, which collided with his wagon and injured him. *Held*, that he was not negligent, as matter of law; but it was for the jury to determine, that it might be that it was more prudent for him to drive at the usual speed of the defendant's cars when he had only from ninety to ninety-five feet to go to get entirely clear of the track, rather than to have driven at a slower rate and thereby to have given to a car which was from 300 to 350 feet away when he was eighty feet from the crossing, more time to meet him at the crossing; nor could it be said as matter of law that he should have gotten down from his wagon, gone forward in advance of his horse, and looked to see if a car was coming, before driving on to the crossing. *Kelley v. Wakefield & S. St. Ry. Co.*, 61 N. E. 139, 23 Am. & Eng. R. Cas. 67. Plaintiff attempted to drive across a double street car track with his vehicle, a car approaching on each track, the one nearest him somewhat obstructing his view of the other car; he was not driving fast; an open man-hole in the street necessitated his crossing the track, and it was at a regular crossing; he could not see the car approaching that was on the farther track, but the motorman of that car could have seen his horse as he drove upon

the track; as the horse stepped upon the farther track the car upon the inner track slowed down, and the one upon the farther track, driven at an excessive rate of speed, struck his vehicle and inflicted the injuries complained of. *Held*, that his contributive negligence was a question for the jury. *Cooke v. Los Angeles & P. El. Ry. Co.*, 66 Pac. 306, 23 Am. & Eng. R. Cas. 69. And see *Capital Tract. Co. v. Lusby*, 26 Wash. L. Rep. 163, 12 App. D. C. 295; *Reid v. Brooklyn H. R. Co.*, 32 App. Div. (N. Y.) 503, 53 N. Y. Supp. 209; *Little v. Superior R. T. Ry. Co.*, 5 Am. Electl. Cas. 599, 88 Wis. 402; *Evansville St. R. Co. v. Gentry*, 147 Ind. 408, 37 L. R. A. 378, 5 Am. & Eng. R. Cas. (N. S.) 500, 44 N. E. 311; *West Chicago St. R. Co. v. Nilsson*, 70 Ill. App. 171; *Consol. Tract. Co. v. Scott*, 6 Am. Electl. Cas. 516, 58 N. J. L. (29 Vroom) 682, 32 L. R. A. 122, 34 Atl. 1094, 55 Am. St. Rep. 620, 4 Am. & Eng. R. Cas. (N. S.) 371; *Holmgren v. St. Paul City R. Co.*, 61 Minn. 85, 63 N. W. 270; *Cincinnati St. R. Co. v. Whitcomb* (C. C. App. 6th C.), 66 Fed. 915, 1 Ohio Dec. Fed. 5; *Shea v. St. Paul City R. Co.* (Minn.), 52 N. W. 902, 7 Am. R. & Corp. Rep. 1.

Having reference to the rule in crossing steam railroad tracks the New York Court of Appeals has recently said: "While the general rule requires a traveler upon a public highway, who is about to cross at grade the track of a

be held to have seen that which was obvious.<sup>50</sup> A diversion of attention, generally speaking, will not excuse the perform-

railroad, to both look and listen, in order to learn whether a train is approaching, it is applied 'only when it appears from the evidence that he might have seen, had he looked, or might have heard, had he listened.' (*Smedis v. Brooklyn, etc., R. Co.*, 88 N. Y. 14, 20; *Thompson v. N. Y. C.*, 110 id. 637, 17 N. E. 690; *Palmer v. N. Y. C.*, 112 id. 234, 243, 19 N. E. 678; *Pruey v. N. Y. C.*, 41 App. Div. [N. Y.] 160, 166 N. Y. 616, 58 N. Y. Supp. 797.) He is not required to look or listen when neither would do any good, and such, as the jury might have found, was the situation when the decedent met his death. The fact that an observer, in the possession of all his faculties, who was very near the decedent and walked alongside as he drove from the point where he stopped until he reached the track, and looked and listened all the time, but did not see or hear the approaching engine, is some evidence, when considered in connection with the surrounding circumstances, that if the decedent had looked and listened he would neither have seen nor heard." *Fejdowski v. D. & H. C. Co.*, 168 N. Y. 500, 53 N. Y. L. J. 801; *Hall v. Ogden City R. Co.*, 6 Am. Electl. Cas. 598, 13 Utah, 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. (N. S.) 77.

50. *McCawley v. Phila. Tract. Co.*, 13 Pa. Super. Ct. 354; *Dieck v. New Orleans City & L. R. Co.*, 51 La. Ann. 262, 25 So. 71; *Caw-*

*ley v. La Crosse City R. Co.*, 101 Wis. 145, 12 Am. & Eng. R. Cas. (N. S.) 453, 77 N. W. 179; *Creamer v. West End St. Ry. Co.*, 156 Mass. 320, 31 N. E. 391; *Young v. Citizens' St. Ry. Co.*, 6 Am. Electl. Cas. 479, 148 Ind. 54, 44 N. E. 927; S. C., 47 id. 142; *Smith v. El. Tract. Co.*, 6 Pa. Dist. 471, 40 W. N. C. 486; *Hoelzel v. Crescent City R. Co.*, 49 La. Ann. 1302, 38 L. R. A. 708, 22 So. 330; *Consol. Tract. Co. v. Haight*, 59 N. J. L. (30 Vroom) 577, 37 Atl. 135; *Baltimore Tract. Co. v. Helms*, 84 Md. 515, 36 L. R. A. 215, 36 Atl. 119; *Hickey v. St. Paul City R. Co.*, 60 Minn. 119, 61 N. W. 893; *Olmslaer v. Pittsb. & B. Tract. Co.*, 168 Pa. St. 519, 32 Atl. 50, 26 Pittsb. L. J. (N. S.) 15; *Ehrisman v. East Harrisburg City Pass. R. Co.*, 4 Am. Electl. Cas. 486, 150 Pa. St. 180, 24 Atl. 596, 30 W. N. C. 373, 23 Pittsb. L. J. (N. S.) 73; *Carson v. Federal St. & P. V. R. Co.*, 147 Pa. St. 219, 20 Wash. L. Rep. 668, 50 Am. & Eng. R. Cas. 462, 23 Atl. 369, 15 L. R. A. 257, 29 W. N. C. 402; *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65; *Wheelahan v. Phila. Tract. Co.*, 150 Pa. St. 187, 24 Atl. 688, 30 W. N. C. 375; *Vonelling v. Met. St. R. Co.*, 35 Misc. Rep. (N. Y.) 301, 71 N. Y. Supp. 751; *Warren v. Bangor, etc., Ry. Co.*, 95 Me. 115, 49 Atl. 609; *Highland Ave. & B. Ry. Co. v. Sampson*, 112 Ala. 425, 20 So. 566; *Fairbanks v. Bangor, O. & O. Ry. Co. (Me.)*, 49 Atl. 421; *Wosika v. St. Paul*

ance of this duty, neither will misconduct on the part of the railway company. If the negligence of the plaintiff, or his intestate, contributed to the injury, no matter how negligent the defendant may have been, unless such negligence was wanton or malicious, the plaintiff cannot recover.<sup>51</sup> This

City Ry. Co. (Minn.), 83 N. W. 386; Downs v. St. Paul City Ry. Co., 75 Minn. 41, 77 N. W. 408; Blaney v. El. Tract. Co., 184 Pa. St. 524, 39 Atl. 294, 41 W. N. C. 555; Culberts v. Met. St. R. Co., 140 Mo. 35, 36 S. W. 832; Graff v. Detroit Citizens' R. Co., 109 Mich. 77, 5 Am. & Eng. R. Cas. (N. S.) 447, 67 N. W. 815, 3 Det. Leg. N. 12; Healey v. Brooklyn H. R. Co., 18 App. Div. (N. Y.) 623, 45 N. Y. Supp. 393.

So where the accident occurred on a clear morning in early autumn at about 10 o'clock to a driver, who was familiar with the line of the railway tracks and with the usual rate of speed of the cars, which he regarded as dangerous, his horse being easily managed and accustomed to the cars, and who looked when he reached the curb on the south side of the street he was about to cross and saw that no cars were approaching from the west, but did not look east, although he might have had a clear view for a half mile up the track, and did not turn his attention to the east until just as the car struck him; it was held that he was negligent as matter of law, and that his negligence contributed proximately to the injury. Merritt v. Foote (Mich.), 87 N. W. 262, 23 Am. & Eng. R. Cas. 43. A driver is negligent who, after stopping his horse ten

or twelve feet from the street car track whence he could see three-quarters of a mile, and seeing no car attempts to go forward, but being stalled, backs up the ten or twelve feet and then goes forward with a spurt, not looking, and then collides with the car. Kern v. Second Ave. Tract. Co., 194 Pa. St. 75, 45 Atl. 125. And see Schausten v. Toledo Consol. Tract. Co., 18 Ohio C. C. 691. And see Burke v. Union Tract. Co., 198 Pa. St. 497, 48 Atl. 470.

51. Tesch v. Milwaukee El. Ry. & L. Co., 108 Wis. 593, 84 N. W. 822; Citizens' St. R. Co. v. Helvie, 22 Ind. App. 515, 53 N. E. 191, 1 Repr. 750; McGee v. Consol. St. R. Co., 5 Am. Electl. Cas. 462, 102 Mich. 107, 26 L. R. A. 300, 60 N. W. 293; Carson v. Federal St. & P. Val. R. Co., 147 Pa. St. 219, 15 L. R. A. 257; Fritz v. Detroit C. R. Co., 5 Am. Electl. Cas. 480, 105 Mich. 50.

Where one is struck by a street car, having neglected when two or three feet from the track to look in the direction of the approaching car, then in plain view, although he had looked when about twelve feet from the track but could not then see the car because his view was obstructed, he cannot recover for the injuries suffered in the collision. Doherty v. Detroit Citizens' St. R. Co., 118

rule should be applied with greater strictness to a pedestrian than to a driver of a vehicle. A pedestrian ought never to go upon the track without looking or taking precautions to discover and avoid an approaching car.<sup>52</sup> The motorman, or gripman, or driver of an approaching car has the right to assume that a person traveling on the track in front of the car or about to cross, to whom the customary warnings had been given, has made himself aware of the approach of the car and will either increase his speed or turn aside and avoid the danger which threatens him.<sup>53</sup> Failure of those in charge of a car to obey the rule or custom of the company requiring all cars to stop before passing a car when stopped at the crossing or station, will not absolve a driver from the duty of vigilance.<sup>54</sup> Nor will deafness or any physical or artificial

Mich. 209, 213, 5 Det. Leg. N. 489, 76 N. W. 377; affd., 80 N. W. 36; Blakeslee v. Consol. St. Ry. Co., 5 Am. Electl. Cas. 486, 105 Mich. 462, 63 N. W. 401, 2 Det. Leg. N. 154. The negligence of the defendant appearing, the contributory negligence to prevent a recovery must be such as materially contributed to the accident. Citizens' St. R. Co. v. Allbright, 14 Ind. App. 433, 42 N. E. 238; Fejdowski v. D. & H. C. Co., 168 N. Y. 500, 53 N. Y. L. J. 801.

52. Consolidated & C. P. R. Co. v. Wyatt, 59 Kan. 772, 52 Pac. 98, 9 Am. & Eng. R. Cas. (N. S.) 756.

53. McLaughlin v. New Orleans & C. R. Co., 6 Am. Electl. Cas. 484, 48 La. Ann. 23.

54. Doyle v. Albany Ry. (N. Y.), 6 Am. Electl. Cas. 532. In a recent case for injuries in a collision with a street car, it appeared that plaintiff looked toward the west

for cars as he stepped from the curb, and while crossing the street kept looking to the east; cars were running both east and west; the car which struck him made a full stop and waited for pedestrians to pass in front of it before proceeding. A very brief time elapsed after he left the curb and before he was struck. *Held*, that he was negligent in not looking for the car before stepping on the track just ahead of it, and cannot recover. McGraff v. North Jersey St. Ry. Co. (N. J.), 49 Atl. 520. And see as to a driver of a horse and buggy who did not look until the horse was on the track, Trout v. Altoona & L. V. El. Ry. Co., 13 Pa. Super. Ct. 17; Helber v. Spokane St. Ry. Co., 22 Wash. 319, 61 Pac. 40. As to one who looked and then his view became obstructed, and when he passed the obstruction did not look again

disability to look or listen absolve him from this duty, unless of course the artificial obstructions are those over which he has no control.<sup>55</sup> In New Jersey and some other States however the principle of law is held now to be well established, that it is not negligence in law for a person driving a vehicle in approaching a street crossing over which he intends to cross, to fail to look for an approaching street car, in order to avoid danger from it.<sup>56</sup>

and was held therefore negligent, see *Kelley v. Wakefield & S. St. Ry. Co.*, 175 Mass. 331, 56 N. E. 285; *Doherty v. Detroit Citizens' St. Ry. Co.*, 118 Mich. 209, 76 N. W. 377; *Merritt v. Foote* (Mich.), 87 id. 262, 8 Det. Leg. N. 678.

55. *Schulte v. New Orleans, C. & L. R. Co.*, 44 La. Ann. 509, 10 So. 811; *Cawley v. La Crosse City Ry. Co.*, 106 Wis. 239, 82 N. W. 197; *Boerth v. West Side R. Co.*, 87 Wis. 288, 58 N. W. 376. The driver of a truck following a street car must wait until the car has advanced far enough to give him an unobstructed view of the adjoining track before attempting to cross it. *Baumann v. Met. St. R. Co.*, 21 Misc. Rep. (N. Y.) 658, 47 N. Y. Supp. 1094. Where the driver and the cable car, approaching the same point, stop, and each supposing the other would continue to stop passed on to collision, the railroad company cannot be held liable for the driver's injuries. *West Chicago St. R. Co. v. Bocker*, 70 Ill. App. 67. One who alights from a street car and attempts to cross a parallel track without looking for an approaching car from the other direction on a straight track, cannot recover

for injuries if struck by such car. *Baltimore Tract. Co. v. Helms*, 84 Md. 515, 36 L. R. A. 215, 36 Atl. 119.

56. *Dennis v. North Jersey St. Ry. Co.* (N. J. Sup.), 45 Atl. 807. And see *Wilson v. Memphis St. Ry. Co.*, 105 Tenn. 74, 58 S. W. 334; *North Jersey St. R. Co. v. Schwartz* (N.J.), 49 Atl. 683; *Traver v. Spokane St. Ry. Co.* (Wash.), 65 Pac. 284; *Roberts v. Spokane St. Ry. Co.*, 23 Wash. 325, 63 Pac. 506; *West Chicago St. R. Co. v. Huhnke*, 82 Ill. App. 404, 4 Chic. L. J. Week. 218, 18 Nat. Corp. Rep. 454; *McNulta v. Norgren*, 90 Ill. App. 491. In Illinois it has been held that one is not negligent, as matter of law, in passing around the rear end of a street car from which she has alighted for the purpose of crossing the street, although she goes upon the other track in front of a car which strikes her. *Wallen v. North Chicago St. R. Co.*, 82 Ill. App. 103. In Virginia it was held error to charge that though plaintiff in stepping on the track failed to look and listen, she could recover, if by looking or listening she could neither have seen nor heard the approaching car, where there

**§ 27. Pedestrians.**—A pedestrian may assume that an approaching car is under control, although approaching at a fair rate of speed; if it be sufficiently distant so that in the exercise of ordinary prudence he determines it to be safe he may attempt to cross. For illustration, at a street intersection in a populous city, from twenty to fifty feet in front of the advancing car, he may cross even if he has seen it approaching. The question of his negligence will be for the jury.<sup>57</sup> The mandatory duty to look and listen is not applied with the same rigidity to pedestrians crossing street railroad tracks at intersecting streets, it being the duty of the railroad

was no evidence on which such a charge could be based. Richmond Tract. Co. v. Hildebrand, 34 S. E. 888. And see Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 32 L. R. A. 276, 43 N. E. 207, 35 Ohio L. J. 140; Robbins v. Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334. In Kentucky it was recently held that the trial court did not err in refusing to instruct the jury that it was the duty of a girl twelve years old to look and listen before crossing a street car track, and that it was sufficient to instruct them that it was her duty to exercise such caution as may be reasonably expected of one of her age under the circumstances. Louisville Ry. Co. v. Phillips, 58 S. W. 995, 22 Ky. L. Rep. 842. One who is on a passage-way from which passengers board trains, for the purpose of taking a train then on the track, and who is struck by an electric car coming up from behind because of the narrow passage-way between the two tracks,

does not come within the rule requiring one to look and listen. Conway v. New Orleans City & L. R. Co., 51 La. Ann. 146, 5 Am. Neg. Rep. 354, 24 So. 780.

57. Sesselmann v. Met. St. R. Co., 65 App. Div. (N. Y.) 484; Frank v. Met. St. Ry. Co., 58 App. Div. (N. Y.) 100, 68 N. Y. Supp. 537; Citizens' Ry. Co. v. Ford (Tex. Civ. App.), 60 S. W. 680; Fandell v. Third Ave. R. Co., 162 N. Y. 598, 57 N. E. 1110, affg. 15 App. Div. (N. Y.) 426, 44 N. Y. Supp. 462. Where he travels along a narrow space between two trolley tracks, a place dangerous in itself and not intended for pedestrians, without looking for a car, seeking a shoe cast by one of his horses, and is struck while stooping to pick it up, his negligence will preclude a recovery for injuries sustained. Dix v. Ridge Ave. Pass. Ry. Co., 15 Pa. Super. Ct. 350. And see Floyd v. Paducah Ry. & L. Co. (Ky.), 64 S. W. 653, 23 Am. & Eng. R. Cas. 167.

company to have its cars under control as they approach such crossings.<sup>58</sup> This duty however will not relieve persons approaching street railroad tracks from making fair use of their faculties to avoid collision with a car; and however negligent the street car company may be, the absence of reasonable prudence on the part of the pedestrian crossing its track will not be excused thereby.<sup>59</sup> If other vehicles threaten his safety, or if his attention is distracted by the apparent imminence of danger from other sources, he must act with ordinary prudence, with reference not to any one source of danger, as paramount, but with reference to the group of circumstances that make up the situation by which he is confronted.<sup>60</sup> One cannot voluntarily walk on a street railroad track at night, knowing that a car may come up behind him at any moment, and neglect to use ordinary care to learn of the approach of a car.<sup>61</sup> In a recent case in New York the

58. Mitchell v. Third Ave. R. Co., 62 App. Div. (N. Y.) 371, 70 N. Y. Supp. 1118; Halliday v. Brooklyn Heights R. Co., 59 App. Div. (N. Y.) 57, 69 N. Y. Supp. 174; Young v. Atlantic Ave. R. Co., 5 Am. Electl. Cas. 530, 10 Misc. Rep. (N. Y.) 541, 64 St. Rep. (N. Y.) 124, 31 N. Y. Supp. 441; Altemeier v. Cincinnati St. R. Co. (C. P.), 4 Ohio N. P. 224, 4 Ohio Leg. N. 300; Butelli v. Jersey City H. & R. El. Ry. Co., 59 N. J. L. (30 Vroom) 302, 36 Atl. 700, 2 Chic. L. J. Week. 202; Bunyan v. Citizens' R. Co., 127 Mo. 12, 1 Am. & Eng. R. Cas. (N. S.) 246, 29 S. W. 842; Lake Roland El. R. Co. v. McKewen, 80 Md. 593, 31 Atl. 797; Newark Pass. R. Co. v. Bloch, 4 Am. Electl. Cas. 523, 55 N. J. L. 605; Driscoll v.

Market St. Cable R. Co., 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591; Hickman v. Nassau El. R. Co., 41 App. Div. (N. Y.) 629, 58 N. Y. Supp. 858.

59. Hoelzel v. Crescent City R. Co., 49 La. Ann. 1302, 22 So. 330, 38 L. R. A. 708; Balla v. Met. St. R. Co., 27 Misc. Rep. (N. Y.) 775, 57 N. Y. Supp. 746; Thorsell v. Chicago City R. Co., 82 Ill. App. 375; Nugent v. Phila. Tract. Co., 181 Pa. St. 160, 37 Atl. 206, 40 W. N. C. 243.

60. Connelly v. Railroad Co. (N. J.), 5 Am. Electl. Cas. 510.

61. Smith v. Crescent City R. Co., 47 La. Ann. 833, 17 So. 302. But if he be struck by an electric car while walking in a narrow path intended for foot travelers, and in which it was customary for

court, after determining that the question of defendant's negligence should have been submitted to the jury, said: "We are thus brought to consider the evidence from the standpoint from which the court viewed it in dismissing the complaint on the ground that the plaintiff had failed to show that she was free from contributory negligence. We do not understand the rule to be, with respect to the rapid passage of electric cars, that a person seeing a car in the distance is obliged to wait until it has passed and cars are no longer in sight, for, with the short headway between cars, there is hardly a moment of the day when there would be such a situation. On the contrary, we have many times held that pedestrians are entitled to a reasonable use of the streets and street crossings, and, when exercising such rights, they are justified in assuming that those managing the cars will respect them. If this is not the rule, and motormen are not required to observe the same care in allowing pedestrians a reasonable use of streets and crossings, then should they desire to cross our busy streets and avenues, in which electric cars are constantly passing, they could never get over, or, if they did, it would be only at the risk of life and limb.<sup>61½</sup>

people to walk, near the railroad tracks, after dark, if he have taken precaution to look back for approaching cars, and when struck was 200 or 300 feet from where he last looked back, and the car was running twenty or twenty-five miles an hour at the time of the accident, with only a small kerosene lamp for a headlight, it cannot be claimed that he was contributorily negligent. *Carlson v. Lynn & P. Ry. Co.*, 172 Mass. 388, 5 Am. Neg. Rep. 365, 52 N. E. 520.

<sup>61½</sup>. *Copeland v. Met. St. R. R. Co.*, 67 App. Div. 483, 485. It appeared that the plaintiff had observed the position of the approaching car which, when she was near the track, she saw half a block away and observed at that moment the signal given by her son to stop it. To board the car, which ran close to the sidewalk, it was necessary that she should be on the sidewalk opposite the north crossing, and to reach that point in the shortest way, her direction, as she had started from the south

**§ 28. Children.**—As has been seen, greater vigilance and caution are to be exercised by street surface railroad companies to prevent injuries to children than for the protection of adults.<sup>62</sup> But such company is not liable for the death of a

corner, was diagonally across the track over which she concluded she could pass in safety. Assuming that the signal given by her son would cause the car to slow down or to stop, she proceeded and had almost reached the sidewalk opposite the north corner and had her right foot on the sidewalk and was in the act of placing her left foot thereon, it being raised from the ground for that purpose, when she was struck by the rapidly passing car, which did not stop after the accident occurred until it had gone two lengths farther on. Her judgment that she could cross in safety was in fault only because of the fact that the motorman had decided not to stop, and did not, in answer to the signal, slow down; nor did he, by the ringing of the bell, notify her of his intentions. And see *Madigan v. Third Ave. R. R. Co.*, 68 App. Div. 123, where it appeared that the accident occurred at night while the plaintiff was attempting to cross Third avenue on the south crosswalk at Sixtieth street, for the purpose of taking a south-bound car; that as he left the walk and again went about midway between the curb and the track he looked down the street but did not see any car coming along; that as he stepped upon the north-bound track a companion shouted a warning and in an instant thereafter plaintiff was struck by the north-bound car, which was

traveling at the rate of seven miles an hour; no gong being sounded or any attempt made to stop it; but it appeared that the car was lighted; that its headlight was burning, and that there was nothing to obstruct plaintiff's view thereof, except the columns of the elevated railroad located in the street, and he was held contributorily negligent.

62. *West Chicago St. R. Co. v. Schwartz*, 93 Ill. App. 387; *Colter v. Cincinnati St. Ry. Co.*, 18 Ohio C. C. 382; *Nelson v. Crescent City R. Co.*, 49 La. Ann. 491, 21 So. 631; *Koersen v. Newcastle El. St. Ry. Co.*, 198 Pa. St. 26, 47 Atl. 850; *Passameneck v. Louisville R. Co.*, 98 Ky. 195, 32 S. W. 620, 17 Ky. L. Rep. 763; *Woeckner v. Erie El. Motor Co.*, 6 Am. Electl. Cas. 581, 176 Pa. St. 451, 35 Atl. 182, 38 W. N. C. 549. A charge of negligence against a street railroad company cannot be predicated on an unexplained accident to a child. *Smith v. Kansas City El. Ry. Co.* (Kan.), 60 Pac. 1059. In California it is held that although it is the duty of the company to provide proper service to manage its cars, it is required to exercise only ordinary care in performing such duty as to an infant who gets upon the track. *Cunningham v. Los Angeles St. R. Co.*, 115 Cal. 561, 47 Pac. 452. And see *Wallace v. City & Sub. Ry. Co.*, 5 Am. Electl.

child, *non sui juris*, resulting from his suddenly coming in front of the car when it is too near him to stop it before inflicting the injury.<sup>63</sup> A child may attempt, in the streets of a crowded city, to cross the street railroad tracks in front of an approaching car. He is bound to use reasonable care under the circumstances, but he need not, as matter of law, anticipate that he may fall, nor are those operating the approaching car required to assume that he may fall. It is a question for the jury.<sup>64</sup> The same rule is applicable to a child say

Cas. 554, 26 Oreg. 174; San Antonio St. Ry. Co. v. Mechler, 5 Am. Electl. Cas. 585, 87 Tex. 628; 30 S. W. 899; Reiley v. Salt Lake R. T. Co., 5 Am. Electl. Cas. 594, 10 Utah, 428.

63. Culbertson v. Crescent City R. Co., 48 La. Ann. 1376, 20 So. 902; Sciortino v. Crescent City R. Co., 49 La. Ann. 7, 21 So. 114; Finlay v. West Chicago St. Ry. Co., 90 Ill. App. 368; Graham v. Consol. Tract. Co. (N. J.), 44 Atl. 964; Frank v. Met. St. Ry. Co., 44 App. Div. (N. Y.) 243, 60 N. Y. Supp. 616; Hirschman v. Dry Dock, etc., Co., 46 App. Div. (N. Y.) 621, 61 N. Y. Supp. 304; Hunter v. Consol. Tract. Co., 193 Pa. St. 557, 44 Atl. 578; Ogier v. Albany Ry. Co., 5 Am. Electl. Cas. 545, 88 Hun (N. Y.), 486; Pletcher v. Scranton Tract. Co., 185 Pa. St. 147, 39 Atl. 837; Mulcahy v. El. Tract. Co., 185 Pa. St. 427, 39 Atl. 1106; Ledman v. D. D., etc., Co., 28 App. Div. (N. Y.) 197, 50 N. Y. Supp. 895; Mullen v. Springfield St. R. Co., 164 Mass. 450, 41 N. E. 664; Funk v. El. Tract. Co., 175 Pa. St. 559, 34 Atl. 861; Flannigan v. People's Pass. R. Co., 163 Pa. St.

102, 29 Atl. 743; Chilton v. Central Tract. Co., 152 Pa. St. 425, 25 Atl. 606, 31 W. N. C. 409, 23 Pittsb. L. J. (N. S.) 413; Sheets v. Connolly St. R. Co., 54 N. J. L. (25 Vroom) 518, 24 Atl. 483; Baker v. Eighth Ave. R. Co., 62 Hun (N. Y.), 39, 16 N. Y. Supp. 319, 41 St. Rep. (N. Y.) 353; Kennedy v. St. Louis R. Co., 43 Mo. App. 1; Morey v. Gloucester St. R. Co., 171 Mass. 164, 50 N. E. 530.

64. Fenton v. Second Ave. R. Co., 126 N. Y. 625, 56 St. Rep. (N. Y.) 385, 26 N. E. 967, revg. 56 Hun (N. Y.), 99; Lhowe v. Third Ave. R. Co., 14 Misc. (N. Y.) 612, 71 St. Rep. (N. Y.) 451, 36 N. Y. Supp. 463; Block v. Harlem, etc., Co., 28 St. Rep. (N. Y.) 495, 9 N. Y. Supp. 164; Dorsch v. Brooklyn Heights R. R. Co., 68 App. Div. 222.

In the case last cited, it was held that the question of contributory negligence should be submitted to the jury, where the plaintiff, a girl nine years old, having been run over by one of the defendant's electric cars while attempting to cross a city street, was shown to be near the gutter, and before at-

fourteen years of age, intelligent and well grown, as to an adult person.<sup>65</sup> And it has been held that a boy eight years old, of ordinary intelligence for that age, standing on the street car track while a car is approaching sixty to seventy-five feet from him at the rate of nine miles an hour, not being confused, is so negligent that a verdict in his favor will be set aside; the motorman perceived that he saw the car which struck him, and therefore made no effort to stop.<sup>66</sup> But the capacity of a child four or five years of age to care for its safety is a question for the jury.<sup>67</sup> The same rule has been repeatedly applied by the New York Court of Appeals to infants varying in age from six to fifteen years. And in a recent case it was held that the court might not, as matter of law, say that a boy eight years of age and intelligent for that age, was *non sui juris*; and that as matter of law the same degree of care or circumspection should be required of such a child as of an adult.<sup>68</sup> A street railroad company is liable

tempting to cross the street had looked both ways and observed that the car which ran over her was then about 170 feet distant, and then proceeded at a fast walk across the track.

65. Wills v. Ashland, etc., Ry. Co., 108 Wis. 255, 84 N. W. 998. So of nine years of age and of unusual intelligence. Ryan v. La Crosse City Ry. Co., 108 Wis. 122, 83 N. W. 770; Brady v. Consol. Tract. Co. (N. J.), 45 Atl. 805; Fitzhenry v. Consol. Tract. Co. (N. J.), 46 id. 698; Hicks v. Nassau El. R. Co., 47 App. Div. (N. Y.) 479, 62 N. Y. Supp. 597; Thompson v. B. R. Co., 5 Am. Electl. Cas. 535, 145 N. Y. 196, 39 N. E. 709, 64 St. Rep. (N. Y.) 591.

66. Griffith v. Met. St. Ry. Co.,

32 Misc. Rep. (N. Y.) 289, 66 N. Y. Supp. 801.

67. So held where a child was walking backward on a street car track toward a moving car and was struck by the car. Markie v. Consol. Tract. Co. (N. J.), 46 Atl. 573; Adams v. Nassau El. R. Co., 51 App. Div. (N. Y.) 241, 64 N. Y. Supp. 818; Finkelstein v. Brooklyn Heights R. Co., 51 App. Div. (N. Y.) 287, 64 N. Y. Supp. 915.

68. Costello v. Third Ave. R. Co., 161 N. Y. 317, 55 N. E. 897, citing McGovern v. N. Y. C., etc., Co., 67 N. Y. 421; O'Mara v. H. R. R. Co., 38 id. 449; Reynolds v. N. Y. C., etc., Co., 58 id. 248; Byrne v. Same, 83 id. 621; Dowling v. Same, 90 id. 671; Moebus v. Herr-

for its gross negligence in the management of a car whereby the death of a child less than three years of age resulted, to whom contributory negligence could not be attributed, although it was suffered to roam unattended in the public streets.<sup>69</sup> While it is true that a child *non sui juris* and over, say, five years of age, is not required to exercise the same degree of care which an adult would be required to exercise, yet, such a child is bound to exercise some care—care at least commensurate with its age and intelligence—in approaching and passing known places of danger; therefore it was held that a child between eight and nine years of age attempting to cross a city street in the middle of a block,

mann, 108 id. 353; Stone v. Dry Dock, etc., Co., 115 id. 109, 110; Swift v. Staten Isl. R. T. Co., 123 id. 645, 650. It was also held that the presumption of law was that a boy eight years of age is not *sui juris*, and it rested upon the defendant to establish that he was a bright and intelligent boy and *sui juris*, notwithstanding the fact that he was but eight years of age; citing Tucker v. N. Y., etc., Co., 124 N. Y. 308; Zwack v. N. Y., etc., Co., 160 id. 362. And see Goldstein v. D. D., etc., Co., 35 Misc. Rep. (N. Y.) 200, 71 N. Y. Supp. 477; Brady v. Consol. Tract. Co. (N. J.), 42 Atl. 1054; Henderson v. Detroit Citizens' St. Ry. Co., 116 Mich. 368, 10 Am. & Eng. R. Cas. (N. S.) 812, 74 N. W. 525, 4 Det. Leg. N. 1205; Consol. & C. P. R. Co. v. Wyatt, 59 Kan. 772, 52 Pac. 98, 9 Am. & Eng. R. Cas. (N. S.) 756. A boy ten years of age, who attempted to cross a street car track after dark, above the crossing, in

front of an approaching car not more than ten feet distant, going at the usual rate of speed, was held so negligent as to prevent a recovery for injuries sustained in a collision. De Ioia v. Met. St. R. Co., 37 App. Div. (N. Y.) 455, 56 N. Y. Supp. 22; Ruschenberg v. So. El. R. Co. (Mo.), 61 S. W. 626; Chicago St. Ry. Co. v. Tuohy, 95 Ill. App. 314; Pekin v. McMahon, 154 Ill. 141; 39 N. E. 484; Heitman v. Kinnare, 190 Ill. 156; Chicago City Ry. Co. v. Wilcox, 138 id. 370; 29 N. E. 899; George v. Los Angeles Ry. Co., 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829; Consol. City & C. P. R. Co. v. Carlson, 58 Kan. 62, 48 Pac. 635, 7 Am. & Eng. R. Cas. 274.

69. Bergen Co. Tract. Co. v. Heitman, 61 N. J. L. 682, 40 Atl. 651, 11 Am. & Eng. R. Cas. (N. S.) 286, 4 Am. Neg. Rep. 511; Barnes v. Shreveport City R. Co., 5 Am. Electl. Cas. 452, 47 La. Ann. 1218; Mitchell v. Tacoma R. & M. Co., 13 Wash. 560, 43 Pac. 528.

either without looking for an approaching street car or in plain and heedless disregard of its rapid approach, is negligent in law.<sup>70</sup> If the railroad company's employees are grossly negligent, whereby its car runs over and kills a child say four and one-half years of age, or under, the negligence of the parents in permitting it to wander upon the track will not relieve the company from liability for its death.<sup>71</sup> If the negligence of the railroad company be not gross, then the child or parent cannot recover damages under such circumstances. Whether the parents were negligent is nearly always a question for the jury.<sup>72</sup> In a recent case it appeared

70. Weiss v. Met. St. R. Co., 33 App. Div. (N. Y.) 221, 53 N. Y. Supp. 449; affd., 165 N. Y. 665, 59 N. E. 1132. And see Morey v. Gloucester St. R. Co., 171 Mass. 164, 50 N. E. 530; McLaughlin v. New Orleans & C. R. Co., 48 La. Ann. 23, 18 So. 703; Bello v. Met. St. R. Co., 2 App. Div. (N. Y.) 313, 73 St. Rep. (N. Y.) 18, 37 N. Y. Supp. 969; Manahan v. Steinway & H. P. Ry. Co., 125 N. Y. 760, 35 St. Rep. (N. Y.) 813, 26 N. E. 736.

71. Fox v. Oakland Consol. R. Co., 118 Cal. 55, 9 Am. & Eng. R. Cas. (N. S.) 825, 50 Pac. 25. And see *post*, § 31.

72. Neun v. Rochester Ry. Co., 165 N. Y. 146, 58 N. E. 876; Schwartz v. Union Tract. Co. (Pa. C. P.), 30 Pittsb. L. J. (N. S.) 153; Albert v. Albany Ry. Co., 6 Am. Electl. Cas. 529. "To suffer a child to wander on the street, has the sense of *permit*. If such permission or sufferance exist, it is negligence. This is the assertion of a principle. But whether

the mother did suffer the child to wander is a matter of fact, and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be *reasonable* care, depending on the circumstances. This is a fact for the jury." Per AGNEW, Ch. J., in Phila. & R. R. Co. v. Long, 75 Pa. St. 257. And see Dunseath v. Pittsb., etc., Tract. Co., 5 Am. Electl. Cas. 561, 161 Pa. St. 124; 28 Atl. 1020; West Chicago St. R. Co. v. Scanlon, 68 Ill. App. 626; affd. in 168 Ill. 34, 48 N. E. 149; Passameneck v. Louisville R. Co., 98 Ky. 195, 32 S. W. 620, 17 Ky. L. Rep. 763; Harkens v. Pittsb., etc., Tract. Co., 6 Am. Electl. Cas. 571, 173 Pa. St. 147; Fullerton v. Met. St. Ry. Co., 63 App. Div. (N. Y.) 1, 25 N. Y. L. J. 1980, 71 N. Y. Supp. 326; affd., 170 N. Y. ; Mitchell v. Tacoma R. & M. Co., 9 Wash. 120, 37 Pac. 341; Compagnie C. F. a Pass v. Dufresne, M. L. Rep. 7 Q. B. 214; Adams v. Met. St. Ry. Co., 60 App. Div. (N. Y.) 188, 69 N. Y.

that an infant four years of age, conceded to be *non sui juris*, was run down by one of the defendant's horse cars while walking by the side of his father, who was wheeling another child in a baby-carriage across the defendant's tracks. The court charged, among other things: "If you find that the plaintiff could have crossed the street and avoided the car but for the carelessness of the defendant's driver, and that he did drive impetuously, you must find for the plaintiff;" and it was held error as having eliminated from the charge the question of the contributory negligence of the plaintiff's father.<sup>72½</sup>

**§ 29. Infirm persons.**—The rules applicable in collision between street cars and children are applicable also in the case of aged and infirm persons, save that the employees of the railroad company managing a car approaching a crossing, or a pedestrian, are not able to detect the fact so readily of an adult pedestrian's incapacity or disability. Knowing that the pedestrian upon the track or near it and apparently about to cross is an aged or an infirm person, the motorman or gripman is bound to greater caution in approaching and

Supp. 1117; Jones v. Brooklyn Heights R. Co., 5 Am. Electl. Cas. 533, 10 Misc. Rep. (N. Y.) 543. Whether a mother is justified in believing that she can rescue her child from an approaching cable car within eighty or ninety feet distance without danger to herself, is a question of fact for the jury. West Chicago St. R. Co. v. Liedemann, 87 Ill. App. 638; affd., 58 N. E. 367; Marteneau v. Rochester R. Co., 81 Hun (N. Y.), 263, 62 St. Rep. (N. Y.) 722, 30 N. Y. Supp. 778; Barnes v. Shreveport C. R. Co., 47 La. Ann. 1218, 17 So. 782. A mother cannot recover

for the death of her child twenty months old, which she has left in the kitchen and allows to pass her out into the street and across the sidewalk and go twenty-eight feet to a street railroad track, where it is killed in her immediate view, she, meantime, talking to friends and not knowing that it was her child that was killed until after the accident. Johnson v. Reading City Pass. R. Co., 160 Pa. St. 647, 28 Atl. 1001, 34 W. N. C. 203.

72½. Lifschitz v. D. D., E. B. & B. R. R. Co., 67 App. Div. 602.

passing him; and whether or not the aged or infirm person is negligent in attempting to cross the track at the time and place is quite generally a question for the jury. A person must reasonably exercise all the faculties which he has to learn of an approaching car and to keep out of its way; so that, with the entire street open to her, a woman, knowing that she cannot hear a car's approach and that a car is coming behind her, who walks on the street railroad track, is guilty of such negligence that she cannot recover damages for an injury occasioned in being run down.<sup>73</sup>

**§ 30. Bicyclists.**— It is a notorious fact that bicyclists are accustomed to ride between the tracks of a street railroad or between the double tracks until a car approaches from the rear to within a short distance before turning out; and the employees of the company in control of that car are not chargeable with negligence in approaching at the usual speed from the rear, although the bicyclist does not look back or give any indication that he heard the gong or other sound of the car's approach, and suddenly turns and attempts to cross the track in front of the car.<sup>74</sup> And it is contributive

73. Gilmartin v. Lack. Val. R. T. Co., 186 Pa. St. 193, 40 Atl. 322. And see Walls v. Rochester R. Co., 92 Hun (N. Y.), 581, 72 St. Rep. (N. Y.) 250, 36 N. Y. Supp. 1102; Mills v. Brooklyn City R. Co., 10 Misc. Rep. (N. Y.) 1, 62 St. Rep. (N. Y.) 645, 30 N. Y. Supp. 532; Schutte v. New Orleans C. & L. R. Co., 44 La. Ann. 509, 10 So. 811; Butelli v. Jersey City H. & R. El. Co., 59 N. J. L. (30 Vroom) 302, 36 Atl. 700, 2 Chic. L. J. Wkly. 202; West Chicago St. R. Co. v. Ranstead,

70 Ill. App. 111, 2 Chic. L. J. Wkly. 271; Hall v. West End St. R. Co., 168 Mass. 461, 47 N. E. 124; Robbins v. Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334; Farrar v. New Orleans & C. R. Co., 52 La. Ann. 417, 26 So. 995; Killen v. Brooklyn Heights R. Co., 48 App. Div. (N. Y.) 557, 62 N. Y. Supp. 927.

74. Gagne v. Minneapolis St. R. Co. (Minn.), 79 N. W. 671; Mein v. La Crosse City Ry. Co. (C. C. App. 7th C.), 92 Fed. 85, 34 C. C. A. 224; Gould v. Union Tract.

negligence, as matter of law, for a man of mature age, in good health and in full possession of all his faculties, to ride upon a bicycle upon the tracks of an electric street railroad, in the same direction in which the cars are accustomed to run on those tracks, without looking or listening for the approach of the cars.<sup>75</sup> His vehicle is swift and noiseless.

Co., 190 Pa. St. 198, 42 Atl. 477, 43 W. N. C. 521, 5 Am. Neg. Rep. 717; Lurie v. Met. St. R. Co., 18 Misc. Rep. (N. Y.) 81, 40 N. Y. Supp. 1129.

75. Everett v. Los Angeles Consol. El. Ry. Co., 6 Am. Electl. Cas. 460, 115 Cal. 105, 34 L. R. A. 350, 43 Pac. 207; affd., 46 id. 889; Cleveland, P. & E. R. Co. v. Nixon, 21 Ohio C. C. 736, 12 O. C. D. 79; Bennett v. Detroit Citizens' St. R. Co. (Mich.), 82 N. W. 518; Medcalf v. St. Paul City R. Co. (Minn.), 84 N. W. 633; Bacon v. Consol. Tract. Co. (Pa. C. P.), 30 Pittsb. L. J. (N. S.) 431. A bicycle rider can lawfully use the aperture existing between the rails of a cable road and in which the cable runs. He is under no legal obligation to look behind him in order to detect the approach of a cable car which gives no signal of its approach, the rumble and noise of which he hears only just as he is struck by it. Rooks v. Houston, etc., R. Co., 10 App. Div. (N. Y.) 98, 41 N. Y. Supp. 824, 29 Chic. Leg. N. 118. The appellate court said: "The trial court held him to be guilty of contributory negligence, as matter of law, because he failed to look back. No such duty was imposed upon him, as matter of law. His primary duty was to look in

front of him, indeed, to keep a good lookout all around. But he cannot ride upon his bicycle at all—certainly not with safety—and yet keep his head turned so as to observe what was going on behind. Whether his failure to observe the car at the time of, and under the circumstances surrounding the accident, amounted to contributory negligence, was, to say the least, a question for the jury. He certainly had the right to expect the usual warning in his rear. Had that been given, he would, of course, be bound to protect himself by getting off the track and making way for the approaching car. Here however there was no warning. The gong was not sounded. There was no whistle, cry, or notice of any kind. The plaintiff was proceeding lawfully and with a justifiable sense of security. The first that he heard was the rumble and noise of the cable car."

One unaccustomed to riding a bicycle, attempting to ride it upon a city street, is not thereby so negligent as to preclude a recovery for injuries sustained by being run over, without warning, by a street car, where she lost control of the wheel and ran into the street into which the car was moving. Louisville R. Co. v. Blaydes, 21 Ky. L.

Those managing the cars have the right to assume that he can and will keep out of the way. Of course, if the bicyclist be a child or deprived of some faculty, possessing which he might have recognized the car's approach, these facts will be considered on the question of his contributive negligence.<sup>76</sup> Where death is occasioned to a bicyclist in collision with a street car which rounded a curve just as he was emerging from behind a car headed in the opposite direction, which he had been following and which had stopped for a signal before entering upon the curve, he being familiar with the curve, the streets, and the danger, and being an expert rider, a recovery cannot be had for his death.<sup>77</sup> While a trolley wire charged with electricity, hanging down in the public street, is a condition supporting the presumption that there was some disarrangement in the appliances, however perfect may have been their mechanical construction, and raises the inference of negligence;<sup>78</sup> yet, where the only proof of the fact is the testimony of a plaintiff who claimed that while bicycling upon an absolutely dry asphalt pavement, on a clear, dry day, his bicycle having a rubber tire, he came in contact with a wire so hanging down and suffered injury thereby, and the scientific fact is proved without dispute that the asphalt when dry is a non-conductor of electricity and so is the concrete which forms the basis of the pavement and the rubber which is the tiring of the bicycle wheels, a verdict in favor of the bicyclist against

Rep. 480, 51 S. W. 820; affd. on rehearing, 52 S. W. 960, 6 Am. Neg. Rep. 531.

76. Roberts v. Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506.

77. Cardonner v. Met. St. Ry. Co., 38 App. Div. (N. Y.) 597, 56 N. Y. Supp. 500.

78. Chattanooga El. Ry. Co. v.

Mingle, 103 Tenn. 667, 56 S. W. 23; El. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499; Giraude v. Imp. Co., 107 Cal. 120, 40 Pac. 108; Uggla v. West End St. Ry. Co., 4 Am. Electl. Cas. 389, 160 Mass. 351, 35 N. E. 1126; Snyder v. El. Co. (W. Va.), 39 L. R. A. 502, 28 S. E. 733.

the trolley company will be set aside.<sup>79</sup> Where a railroad company by its charter is required "to construct and keep in repair good and sufficient bridges over or under the railway, where any public or other road shall cross the same, so that the passage of carriages, horses, and cattle across the said railway shall not be impeded thereby;" and at the grade crossing of a turnpike by the single track railroad of the company the bridging consisted of planks four inches thick, laid parallel with the rails, and the crossing is diagonal and dangerous because the view of approaching trains was obstructed, a bicyclist riding over the track and thrown from her wheel and injured by reason of a gap in the bridging just inside the further rail in her course, caused by the removal of six feet in length of one of such planks, may recover for her injuries against the railroad company. Considering the character of the crossing and her duty to look for approaching trains, her failure to notice the gap in the bridging is not negligence, as matter of law.<sup>80</sup>

**§ 31. Proximate cause; or avoidable injury, notwithstanding contributive negligence.—** Contributory negligence must be a direct and proximate cause of an injury in a collision with a street car; otherwise, the company is liable if its negligence is a proximate cause of the injury.<sup>81</sup> It may be stated as a

79. *Walters v. Syracuse R. T. R. Co.*, 64 App. Div. (N. Y.) 150, 71 N. Y. Supp. 853.

80. *Sonn v. Erie Ry.* (N. J. Sup.), 49 Atl. 458.

81. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485; *Costello v. Third Ave. R. Co.*, 161 N. Y. 317; *Bowen v. So. Ry. Co. (S. C.)*, 36 S. E. 590; *McAndrews v. St. Louis & S. Ry. Co.*, 83 Mo.

App. 233; *Gallagher v. Manchester St. Ry.*, 70 N. H. 212, 47 Atl. 610; *Tate v. Buffalo Ry. Co.*, 55 App. Div. (N. Y.) 507, 67 N. Y. Supp. 403; *Roberts v. Spokane St. Ry. Co.*, 23 Wash. 325, 63 Pac. 506; *Murphy v. Derby St. R. Co.*, 73 Conn. 249, 47 Atl. 121; *Flynn v. Louisville Ry. Co. (Ky.)*, 62 S. W. 490; *Webb v. Chicago City Ry. Co.*, 83 Ill. App. 565; *Laufer v. Bridge-*

rule that a plaintiff who, by his own negligence, has placed himself in a dangerous position where an injury was likely to result, may still recover for such injury if the defendant with knowledge, or such notice as is equivalent to knowledge, of plaintiff's danger, failed to exercise reasonable care by which the injury might have been avoided, unless the injury was the result of the concurrent negligence of both parties.<sup>82</sup>

port Tract. Co., 68 Conn. 475, 37 Atl. 379; Redford v. Spokane St. R. Co., 15 Wash. 419, 46 Pac. 650; Maxwell v. Wilmington City Ry. Co., 1 Marv. (Del.) 199, 40 Atl. 945; Garrity v. Detroit Citizens' St. R. Co., 112 Mich. 369, 70 N. W. 1018, 37 L. R. A. 529; Baltimore City B. R. Co. v. Cooney, 87 Md. 261, 11 Am. & Eng. R. Cas. (N. S.) 759, 39 Atl. 859.

The parents of a child run over by a street car cannot recover against the company because the car ran at an excessive rate of speed, since it appeared that the accident would have happened in the same way had the car been going at a reasonable speed, and the speed was not the proximate cause of the injury. Holdridge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109. In Arkansas it has been held that it was not sufficient that the employees in charge of the street car might have become aware of plaintiff's dangerous position by the exercise of reasonable care. Johnson v. Stewart, 62 Ark. 164, 34 S. W. 889. And see Johnson v. Superior R. T. R. Co., 91 Wis. 233, 64 N. W. 753; Austin Dam & S. R. Co. v. Goldstein, 18 Tex. Civ. App. 704, 45 S. W. 600; Siek v. Toledo Consol. St. R. Co., 16 Ohio C. C. 393, 9 C. D. 51.

A recovery cannot be had for injuries caused by an electric car because of the negligence of the motorman, where the person injured could easily have avoided the injury by the exercise of ordinary care. Cain v. Macon Consol. St. R. Co., 97 Ga. 298, 22 S. E. 918. And see MacLeod v. Graven (C. C. App. 6th C.), 19 C. C. A. 616, 43 U. S. App. 129, 73 Fed. 627; Boentgen v. N. Y. & H. R. Co., 36 App. Div. (N. Y.) 460, 55 N. Y. Supp. 847.

82. Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338, 43 Atl. 762; McKeown v. Cincinnati St. R. Co., 2 Ohio Leg. N. 388; Orr v. Cedar Rapids & M. C. R. Co., 94 Iowa, 423, 1 Am. & Eng. R. Cas. (N. S.) 239, 62 N. W. 851; Cincinnati St. R. Co. v. Whitcomb (C. C. App. 6th C.), 5 Am. Electl. Cas. 602, 66 Fed. 915, 1 Ohio Dec. Fed. 5; North Baltimore Pass. R. Co. v. Arnreich, 78 Md. 589, 28 Atl. 809; Mapes v. Union R. Co., 56 App. Div. (N. Y.) 508, 67 N. Y. Supp. 358; Ennis v. Union Depot R. Co., 155 Mo. 20, 55 S. W. 878; Owensboro City R. Co. v. Hill (Ky.), 56 S. W. 21; Cooney v. So. El. R. Co., 80 Mo. App. 226, 2 Mo. App. Rep. 646; Totarella v. N. Y. & Q. C. Ry. Co., 53 App. Div. (N. Y.) 413, 65 N. Y. Supp.

Placed in a position of peril by the negligence of the operators of the street car, the driver of a team is not himself so negligent as to prevent a recovery for injuries where he increases the peril by an effort, in the exercise of ordinary care, to avoid it, or fails to lessen it or escape by the exercise of unusual courage and self-possession.<sup>83</sup> If a child, by its own

1044; *Tesch v. Milwaukee El. Ry. & L. Co.*, 108 Wis. 593, 84 N. W. 823; *O'Keefe v. St. Louis & S. R. Co.*, 81 Mo. App. 386; *Griffin v. Toledo & M. V. Ry. Co.*, 21 Ohio C. C. 547, 11 O. C. D. 749; *Watermolen v. Fox River El. R. & P. Co.* (Wis.), 85 N. W. 663; *Warren v. Union Ry. Co.*, 46 App. Div. (N. Y.) 517, 61 N. Y. Supp. 1009; *Davies v. People's R. Co.*, 67 Mo. App. 598; *Schoenholtz v. Third Ave. R. Co.*, 16 Misc. Rep. (N. Y.) 7, 73 St. Rep. (N. Y.) 263, 37 N. Y. Supp. 682; *Read v. Brooklyn H. R. Co.*, 32 App. Div. (N. Y.) 503, 53 N. Y. Supp. 209; *Houston City St. R. Co. v. Farrell* (Tex. Civ. App.), 5 Am. Electl. Cas. 576, 29 S. W. 942; *Czezewzka v. Benton-Bellefontaine R. Co.*, 121 Mo. 201, 25 S. W. 911; *Oliver v. Denver Tramway Co.*, 13 Colo. App. 543, 59 Pac. 79; *Brachfeld v. Third Ave. R. Co.*, 29 Misc. Rep. (N. Y.) 586, 60 N. Y. Supp. 988; *Kelley v. Louisville R. Co.*, 20 Ky. L. Rep. 471, 46 S. W. 688; *Montgomery v. Lansing City El. R. Co.*, 5 Am. Electl. Cas. 471, 103 Mich. 46, 29 L. R. A. 287, 61 N. W. 343; *Baltimore Tract. Co. v. Wallace*, 77 Md. 435, 21 Wash. L. Rep. 313, 26 Atl. 518; *Consol. Tract. Co. v. Haight*, 59 N. J. L. (30 Vroom) 577, 37 Atl. 135.

In Wisconsin it is held that a motorman who fails to exercise reasonable care to avoid injuring one who, by her own negligence, has placed herself in danger, is guilty of wanton and reckless conduct, and the company is liable for the injury inflicted. *Little v. Superior R. T. R. Co.*, 88 Wis. 402, 60 N. W. 705.

If an injury is caused by a motorman starting his car and running it against a wagon which had been upset in a previous collision with a car by the concurrent negligence of the driver, an action may be maintained for the injury in the second collision against the railroad company. *McDevitt v. Des Moines St. R. Co.*, 99 Iowa, 141, 6 Am. & Eng. R. Cas. (N. S.) 106, 68 N. W. 595. It is error to charge that if defendant could have avoided the accident by the use of reasonable care, it was liable, even if the accident were caused in the first instance by the carelessness of plaintiff. *Goodman v. M. St. R. Co.*, 63 App. Div. (N. Y.) 84, 71 N. Y. Supp. 177.

83. *Gibbons v. Wilkes-Barre & S. St. R. Co.*, 155 Pa. St. 279, 26 Atl. 417. But see *Rhing v. Broadway & Seventh Ave. R. Co.*, 53 Hun (N. Y.), 321, 6 N. Y. Supp. 641, 25 St. Rep. (N. Y.) 563. In the

negligence in part at least, is thrown upon the fender of a street car, it is the duty of the railroad company, by its servants, to so operate the car as to prevent further injury, if it can do so by the exercise of reasonable care.<sup>84</sup>

case last cited the court said: "In this condition of the proof, the right of recovery for subsequent injuries incurred by reason of the fact that the driver of the car erred in judgment as to the best means to be used to extricate the plaintiff from the position in which he had placed himself, by reason of his own negligence, does not exist. A right of action, under such circumstances, can arise only where the injury was inflicted or increased because of the doing or the omission to do some act or acts the doing of which or the omission to do which was other than the result of an error of judgment as to the means to be used in extricating the plaintiff. Any other rule would, where there were various steps in the happening of an accident culminating in the injuries suffered, authorize a division of liability as to those various steps which contributed to the happening of the whole accident. The plaintiff would not be able to recover for some of these steps by reason of his contributory negligence. But if at any stage of the happening of the accident he was free from contributory negligence, the liability of the defendant would begin, notwithstanding the fact that it had been guilty of no negligence whatever in the initiation of the events which produced the injury. It is clear that this proposition cannot

be maintained, because if the plaintiff was guilty of contributory negligence at all, the effects of such negligence permeate the whole transaction."

84. Weitzman v. Nassau El. St. Ry. Co., 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905. In this case it appeared that a child about five years of age was thrown upon the fender of a street car and was carried a distance of more than thirty feet, when he rolled from the fender and was run over by the car and killed. The court, reversing the judgment below in favor of the defendant, said: "The law does not contemplate that a street railroad corporation shall become a modern Juggernaut, with its sacrificial car traversing with relentless energy the streets and avenues of our populous cities, running down the aged, the feeble and the helpless, who may chance to cross its path, or that, having gathered them into its net, it shall carry them along and offer them as a sacrifice to the cruel wheels at the pleasure of the motorman. Conceding that the plaintiff's intestate was *sui juris*, and that he was, as a matter of law, guilty of contributory negligence in stepping upon the track of the defendant at the same moment that the car arrived at the point of contact, the evidence in the case shows that the child was not killed by the original impact, but that

§ 32. **Attributable negligence.**— As has been seen in a former section, the negligence of those who have the right to and should control the movements of a child *non sui juris*, is sometimes attributable to the child, so that under statutes allowing a recovery to the next of kin for the death of a child, the contributive negligence of those having the custody of the child may be shown to defeat the recovery.<sup>85</sup> Sometimes the negligence of the driver of a vehicle in which another is riding is attributable to that other; but it is only where the relation of principal and agent or master and servant obtains between the two. So, where a person has accepted an invitation to ride, gratuitously, with another every way competent and fit to manage a horse, he is not chargeable with

he was picked up on the fender and carried a considerable distance, when he finally rolled off, and was crushed under the wheels. To say that the defendant owed this child no duty; that it is responsible for no degree of negligence on the part of the servants after it had struck the child and failed to kill him, is to utterly mistake the policy and the rules of law. Whatever may have been the duties or obligations of the parties up to the moment that the child was picked up on the fender, there can be no question as to the obligation of the defendant after that feat had been accomplished, and a failure to discharge that obligation was negligence, to which the child, under the circumstances, could not contribute. It was the duty of the defendant, as we have already pointed out, to equip its cars in such a manner as to reduce to a minimum the

chances of accident. The duty to equip the cars with fenders carries with it the duty to so operate them as to accomplish the end for which they were designed, and a human being, having been gathered into one of these fenders, no matter by what degree of negligence on his part, imposes upon the defendant the immediate duty of so operating the car as to afford him an opportunity to be taken from his dangerous position."

It was held that the case should have been submitted to the jury to determine whether or not the defendant, under these circumstances, had been reasonably careful and prudent. And see Howell v. Rochester Ry. Co., 24 App. Div. (N. Y.) 502, 49 N. Y. Supp. 17; Greene v. Met. St. R. Co., 42 App. Div. (N. Y.) 160, 58 N. Y. Supp. 1039.

85. See § 28.

the negligence of the driver, and contributory negligence upon the driver's part is no defense to an action against a railroad corporation for injuries resulting in a collision.<sup>86</sup> It makes no difference that the driver is the husband or the father of the other;<sup>87</sup> or a fellow servant, as in the case of a fireman driving back from a fire upon a hose-cart.<sup>88</sup> Nor is the negligence of the persons managing a public conveyance, like a street car, to be imputed to a passenger therein;<sup>89</sup> nor the negligence of the driver of a horse car to the conductor whose duties do not extend to the management of the horses, nor to the stopping of the car under the circumstances, involved in the collision.<sup>90</sup> If the person riding is a joint contributor with the driver to the hire of the team for the occa-

86. Robinson v. N. Y. C. & H. R. R. Co., 66 N. Y. 11; Dyer v. Erie Ry. Co., 71 id. 228; Wosika v. St. Paul City Ry. Co. (Minn.), 83 N. W. 386; Countryman v. F. J. & G. R. Co., 166 N. Y. 201; Johnson v. St. Paul City R. Co., 67 Minn. 260, 36 L. R. A. 586, 69 N. W. 900; Louisville, etc., R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Met. St. R. Co. v. Powell, 88 Ga. 601, 16 S. E. 118; Phila., etc., R. Co. v. Hogeland, 66 Md. 149.

87. Phillips v. N. Y. C. & H. R. R. Co., 127 N. Y. 657; Citizens' Ry. Co. v. Washington (Tex. Civ. App.), 58 S. W. 1042; Hennessy v. Brooklyn City R. Co., 73 Hun (N. Y.), 569; affd., 147 N. Y. 721; Lewin v. Lehigh Val. R. Co., 41 App. Div. (N. Y.) 89.

88. Galligan v. Met. St. R. Co., 33 Misc. Rep. (N. Y.) 87.

89. O'Tulle v. Pittsb., etc., R. Co., 158 Pa. St. 99, 22 L. R. A.

606, 24 Pittsb. L. J. (N. S.) 125, 33 W. N. C. 208, 27 Atl. 737; Little Lake, etc., R. Co. v. Harrell, 58 Ark. 454, 25 S. W. 117; Holzab v. New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; East Tenn., etc., Co. v. Markenz, 88 Ga. 60, 14 L. R. A. 281, 13 S. E. 855. But see McGraff v. City & S. R. Co., 93 Ga. 312, 20 S. E. 317, where it is held that a street railroad company is not liable for injuries to passengers in a wagon, caused by collision with one of its street cars, where the driver of the wagon was at the time driving at a prohibited rate of speed, and the accident would not have occurred had he observed ordinary diligence.

90. Hobson v. N. Y. Condensed Milk Co., 25 App. Div. (N. Y.) 111; 49 N. Y. Supp. 209.

A complaint alleging that the plaintiff has sustained "serious and lasting bodily injuries and injuries to her head, limbs and nervous sys-

sion, he is deemed negligent if he does not look for approaching cars on crossing a street car track in a suburban and thinly-settled district of a city.<sup>91</sup> And indeed it should be remembered that no one approaching a place of danger is entirely absolved from the duty of looking out to avoid injury. The fact that he is in a public conveyance, or that he is riding with a competent driver, are circumstances to be considered in determining whether or not in a given case the party claiming to recover for the negligence has himself been guilty of negligence concurring in the result.<sup>92</sup> Where the mistress of a school for small children owned and operated a conveyance in her business for conveying children to and fro between their homes and the school, procured a horse and driver from a livery-stable keeper, for a stipulated price per month, she cannot recover damages for injuries to person and property sustained by her in a collision between her vehicle, driven by such driver, and a street car, without showing that the driver was free from negligence.<sup>93</sup>

#### PLEADING AND PRACTICE.

**§ 33. Pleading.**—It is impossible within the limit and scope of this work to review all the cases against street surface

tem, as well as internal injuries," is sufficient to admit of evidence that the plaintiff sustained inguinal hernia. *Dixson v. Brooklyn Heights R. R. Co.*, '68 App. Div. 302.

91. *Shindelus v. St. Paul City Ry. Co.* (Minn.), 83 N. W. 386.

92. *Ulrich v. Toledo Consol. St. R. Co.*, 10 Ohio C. C. 635, 1 O. C. D. 111; *Hilts v. Foote* (Mich.), 84 N. W. 139, 7 Det. Leg. N. 489; *Cobb v. Met. St. R. Co.*, 56 App. Div. (N. Y.) 187, 67 St. Rep. (N. Y.) 644; *Anderson v. Met. St. Ry.*

Co., 30 Misc. Rep. (N. Y.) 104, 61 N. Y. Supp. 899; *Brennen v. Met. St. Ry. Co.*, 60 App. Div. (N. Y.) 264, 69 N. Y. Supp. 1025; *Morris v. Met. St. R. Co.*, 63 App. Div. (N. Y.) 78, 71 N. Y. Supp. 321; *Koehler v. Rochester*, etc., R. Co., 66 Hun (N. Y.), 566; *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290; *Cain v. People's Pass. R. Co.*, 181 Pa. St. 53, 37 Atl. 110.

93. *Reed v. Met. St. R. Co.*, 58 App. Div. (N. Y.) 87, 68 N. Y. Supp. 539.

railroad companies wherein questions have arisen upon the pleadings, where the *gravamen* of the action was the defendant's negligence. It is sufficient to say that the complaint in such an action is sufficient if it alleges, generally and substantially, that the injury was occasioned by the negligence of the defendant. Degrees of negligence are matters of proof and not of averment. The circumstances constituting the negligence are also matters of proof and not of averment. It is not necessary to allege in the complaint that the injury did not occur through the negligence of the plaintiff. The allegation that it resulted from the negligence of the defendant is equivalent to an allegation that the defendant's negligence was the sole cause of the injury.<sup>94</sup> If the action is brought by the representative of the next of kin, under a statute authorizing such an action, where an injury results in death to their decedent, the complaint need not in any manner directly allude to the statute, but it must state all the facts which are requisite to bring the case within the statute.<sup>95</sup> If the action be brought upon a foreign statute, the rules appertaining to the pleading of a foreign statute

94. Oldfield v. N. Y. & H. R. Co., 14 N. Y. 310; Nowlton v. Western R. Co., 15 id. 444; Urquhart v. City of Ogdensburg, 23 Hun (N. Y.), 75; Melhado v. Poughkeepsie Transp. Co., 27 id. 99. And see St. Louis El. Ry. v. Snow, 88 Ill. App. 660; West Chicago St. R. Co. v. Dedloff, 92 id. 547; Fort Scott R. T. Ry. Co. v. Page (Kan. App.), 59 Pac. 690; Highland Ave. & B. R. Co. v. Robbins (Ala.), 27 So. 422; Paper v. Pueblo City Ry. Co., 4 Am. Electl. Cas. 542, 4 Colo. App. 424. In some States

the statute expressly provides that in actions for negligence it shall not be necessary for the plaintiff to allege or prove the want of contributory negligence. And in Indiana such a statute has recently been held to be not in conflict with the constitutional provision prohibiting the passage of local or special laws regulating the practice in courts of justice. Indianapolis St. Ry. Co. v. Robinson, 61 N. E. 197, 23 Am. & Eng. R. Cas. 181.

95. Brown v. Harmon, 21 Barb. (N. Y.) 508; Safford v. Drew, 3

in the forum must be observed.<sup>96</sup> An allegation that the defendant's street car was running at a high rate of speed is not a sufficient allegation of the defendant's negligence.<sup>97</sup> Quite generally however the facts constituting the negligence are alleged in the complaint,<sup>98</sup> and when so alleged, unless there is also a general allegation that the injury resulted from the negligence of the defendant, the plaintiff may be precluded from proving any other facts showing the defendant's negligence than those alleged in the complaint.<sup>99</sup> And if the facts alleged show upon their face that the plaintiff was guilty of contributory negligence, the pleading is demurrable.<sup>1</sup> If the complaint allege substantially that the injury resulted from the defective condition of a certain part of the street railroad track, and that such road was operated by the defendant company, and the operation is admitted in the answer, the complaint cannot be dismissed because the evidence failed to show that defendant was *prima facie* liable

Duer (N. Y.), 627; Lucas v. N. Y. C. R. Co., 21 Barb. (N. Y.) 245; Kenney v. N. Y. C. & H. R. R. Co., 49 Hun (N. Y.), 535, 2 N. Y. Supp. 512.

96. Throop v. Hatch, 3 Abb. Pr. (N. Y.) 23; Stallknecht v. Penn. R. Co., 53 How. Pr. (N. Y.) 305.

97. Elwood El. St. Ry. Co. v. Ross (Ind. App.), 58 N. E. 535.

98. For illustration, see Citizens' St. Ry. Co. v. Damm, 25 Ind. App. 511, 58 N. E. 564; Elwood El. St. Ry. Co. v. Ross, *supra*. Where the complaint against a street railroad company for personal injuries, the result of a collision, set forth the facts complained of and denominates them "willful conduct," if the facts charged do constitute negligence, it is suffi-

cient to take the case to the jury, although the evidence is insufficient to establish willful wrong. Griffin v. Toledo & M. B. Ry. Co., 21 Ohio C. C. 547, 11 O. C. D. 749.

99. So where the declaration alleged that plaintiff was thrown from her wagon by collision, and there was evidence that she jumped from the wagon, the defendant is entitled to an instruction that if the jury believe from the evidence that she did jump from the wagon, the verdict should be for defendant. West Chic. St. R. Co. v. Cantz, 89 Ill. App. 309.

1. Richmond Tract. Co. v. Hildebrand (Va.), 34 S. E. 888; Highland Ave. & B. R. Co. v. Robbins (Ala.), 27 So. 422.

for the defective condition of the track.<sup>2</sup> Under a general denial, the defendant may introduce any proof showing that its negligence was not the sole cause of the injury, and that it was due to plaintiff's negligence. Indeed, if besides a general denial it is separately alleged that whatever damages were sustained by the plaintiff were due to his own negligence and not the result of any negligence of the defendant, or, that the injuries sustained were occasioned by the negligence of a third person unknown to the defendant, these additional defenses, under the New York Code, are demurrable.<sup>3</sup> Where a new trial is granted upon proof tending to show that testimony given on the former trial by the plaintiff as to her health was false, the defendant should not be required to enter into a stipulation admitting its own negligence and the plaintiff's freedom from contributory negligence.<sup>3½</sup> Since so many lawyers have runners whose duty it is to seek out any one suffering injury from a railroad accident and to offer to prosecute the claim upon a contingent fee, a case in point adjudicating an attorney's rights under an agreement so made may be of interest.<sup>3¾</sup> Sometimes application is made to the court for

2. Schnell v. Met. St. R. Co. (N. Y. Sup.), 64 N. Y. Supp. 67, 50 App. Div. (N. Y.) 616.

3. Levy v. Met. St. Ry. Co., 34 Misc. Rep. (N. Y.) 220, 68 N. Y. Supp. 539; Durst v. Brooklyn Heights R. Co., 33 Misc. Rep. (N. Y.) 124, 67 N. Y. Supp. 227.

3½. Crane v. Brooklyn Heights R. R. Co., 68 App. Div. 202.

3¾. Whitesell v. N. J. H. R. R. & F. Co., 68 App. Div. 82. The representative called upon the plaintiff, a woman, and not succeeding in obtaining her consent to bring the action, but being referred to

her husband who was with her at the time she was injured, he induced the husband to sign an agreement by which the husband authorized (Gottlieb) the attorney to prosecute "my said claim for damages" for a contingent fee of one-half the recovery; the attorney brought the action in behalf of the woman; she repudiated his authority and settled; the attorney claimed that the plaintiff's husband had authorized commencement of the suit. Held, that upon the facts proved an order directing the defendant in the action to

permission to maintain an action in *forma pauperis*. In New York it has been held that it is not sufficient to show that the applicant does not own \$100 of property. The moving papers must also set forth facts showing that he has a good cause of action. Mere advice of counsel, although a certificate of counsel to that effect is required, is insufficient to show a good cause of action.<sup>3½</sup> Nor is it sufficient for the petitioner to merely state that she has not now means to prosecute the action. The application is addressed to the sound discretion of the court, and a petitioner should make it appear by allegation of sufficient facts, that unless the permission is granted, she will be unable to prosecute a good cause of action.<sup>3¾</sup>

pay the attorney half of the amount of the alleged settlement of the action, besides the costs and disbursements, and providing that if such payment were not made the attorney should have leave to prosecute the action to judgment for his own benefit was unjustified and must be set aside; that the attorney at best would be entitled only to the sum of \$15 for serving the summons. *Id.*

Where a statute permits a trial court to conform the pleadings to the facts proved, where the amendment does not substantially change the claim in an action against a street railroad company for injury, where the complaint alleges that the stage of which plaintiff was an occupant was upon a public highway over which defendant's tracks were laid, it is competent to prove upon the trial that defendant owned the fee of the premises where the accident occurred, and for the purpose of sustaining the

judgment the complaint will, on appeal, be deemed to have been amended in harmony with the proofs. It was also held that the contention of the defendant that its invitation to the public extended only to the use of the roadway at the side of its tracks, and the plaintiff in the stage-coach, being on the tracks upon premises of the defendant and no part of the public highway, was a trespasser, and, therefore, could not recover, was not well founded. The tracks were not fenced off or otherwise separated from the roadway, and the defendant was liable if its negligence was the sole cause of the accident, although its act was not wanton, wilful or intentional. *Liekkens v. Staten Is. M. R. Co.*, 64 App. Div. 327; 72 N. Y. Supp. 162.

<sup>3½</sup>. *Weinstein v. Frank*, 56 App. Div. 275, 67 N. Y. Supp. 746.

<sup>3¾</sup>. *Kaufmann v. Manhattan Ry. Co.*, 68 App. Div. 94.

§ 34. **Burden of proof.**—Except the plaintiff be a passenger upon the defendant's cars, in all actions against a street surface railroad the *gravamen* of which is the defendant's negligence, the burden of proof rests upon the plaintiff, and he cannot recover without establishing by a fair preponderance of the evidence that it was solely through the defendant's fault that the injury complained of was occasioned.<sup>4</sup> And this is the rule although the plaintiff was a child of tender years who could not be guilty of contributive negligence.<sup>5</sup> Sometimes the occurrence of the accident itself justifies an inference of the defendant's negligence, as when a pedestrian is injured by stepping upon a loosened rail of a street car track and sues the company charged with its construction and maintenance therefor; then if it appear that the track was properly constructed and had been carefully and recently inspected, and that the rail might have been loosened by some heavy vehicle passing over it immediately before the plaintiff stepped upon it, the plaintiff has not sustained the burden of proof.<sup>6</sup> If the accident was occasioned by the

4. *Siacik v. N. Central Ry. Co.*, 92 Md. 213, 48 Atl. 149; *Hoffman v. Syracuse R. T. Ry. Co.*, 50 App. Div. (N. Y.) 83, 63 N. Y. Supp. 442; *Kay v. Met. St. R. Co.*, 163 N. Y. 447. In the case last cited the court said: "When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon the party who alleges the fact to establish it by proof. The *onus probandi* is upon him throughout. In the case at bar, the plaintiff made out her cause of action *prima facie* by the aid of a legal presumption, but when the proof was all in, the burden of proof had not

shifted, but was still upon the plaintiff." *Dillon v. Forty-second St. R. Co.*, 28 App. Div. (N. Y.) 404, 51 N. Y. Supp. 145; *North Chicago City Ry. Co. v. Lewis* (Ill.), 27 N. E. 451; *O'Neill v. D. D., etc., Ry. Co.*, 129 N. Y. 125, 29 N. E. 84; *Worster v. Forty-second St. R. Co.*, 50 N. Y. 205; *Schild v. C. P., etc., R. Co.*, 133 id. 449.

5. *Cline v. Crescent City R. Co.*, 23 La. Ann. 729; *Cords v. Third Ave. R. Co.*, 4 N. Y. Supp. 439.

6. *Casper v. D. D., etc., R. Co.*, 56 App. Div. (N. Y.) 372, 67 N. Y. Supp. 805.

plaintiff's fall into an excavation in the street near the railroad track, it is not sufficient to prove that the railroad company and its servants were engaged in making excavations in that locality. It is necessary to show that the very excavation into which the plaintiff stepped and which occasioned the injury was made by the defendants, and not by some person whom the defendants could not control.<sup>7</sup> More frequently however the question arises whether or not the plaintiff has sustained his burden of proving the absence of negligence on his own part; and in a recent case in New York, where the plaintiff complained of injuries to his decedent because of a collision between defendant's car and the covered vehicle in which decedent was riding with his wife, upon the same seat, and it appeared that he was trotting slowly along the track, himself not looking to the rear, but that his wife kept a lookout, and a car approached swiftly from the rear, and in the collision he sustained injuries from which he died, it was held that the jury might properly conclude that the vigilance of the wife was known to the decedent, and that under the circumstances he was not negligent.<sup>8</sup> Where the defendant contended that the collision between its car and plaintiff's carriage was caused by plaintiff's horse shying and bringing the vehicle toward the track, the testimony of two witnesses that the carriage was on the track and the car struck it from behind, justifies the submission to the jury of plaintiff's contention that his decedent was driving on the track and the car was run into the rear of his carriage.<sup>9</sup>

7. *Moss v. Crimmins*, 57 App. Div. (N. Y.) 587, 68 N. Y. Supp. 495.

8. *Seifter v. Brooklyn Heights R. Co.*, 55 App. Div. (N. Y.) 10, 66 N. Y. Supp. 1107, revd. 169 N.

Y. 254. And see *Walker v. St. Paul City Ry. Co.*, 81 Minn. 404, 51 L. R. A. 632, 84 N. W. 222.

9. *McCann v. N. Y. & Q. C. Ry. Co.*, 56 App. Div. (N. Y.) 419, 67 N. Y. Supp. 748.

§ 35. Some recent rulings on evidence in actions for personal injuries resulting from collision with street cars.— Where the negligence of the railroad company, as claimed, consists in an unreasonable rate of speed, the usual speed at which the car is wont to be propelled over the portion of the track in question may always be shown.<sup>10</sup> And a motorman may be asked as to the distance within which a car running at a speed of ten or twelve miles an hour could be stopped.<sup>11</sup> The court can take judicial notice of the fact that a trolley car operated at an ordinarily safe rate of speed can be stopped in a shorter space than 100 feet.<sup>12</sup> Upon a contention by plaintiff that the carriage with which the street car collided was struck by the car from behind, the defendant claimed that it was not struck, but that the horse attached thereto shied or was turned onto the track before the car could be stopped. The testimony of two witnesses that the carriage was on the track and the car struck it from behind justifies submission of the question to the jury.<sup>13</sup> Upon the question whether plaintiff was thrown from her wagon by a collision, or whether she jumped therefrom, where the declaration in an action alleged that she was thrown therefrom, the defendant is entitled to an instruction that if the jury believe from the evidence she jumped from the wagon the verdict should be for defendant.<sup>14</sup> Testimony that the car which killed a child was running about ten miles

10. *Shea v. St. Paul City Ry. Co.*, 4 Am. Electl. Cas. 481, 50 Minn. 395.

11. *Pender v. Brooklyn City R. Co.*, 84 Hun (N. Y.), 460, 32 N. Y. Supp. 366, 65 St. Rep. (N. Y.) 573.

12. *Young v. Atlantic Ave. R.*

Co., 10 Misc. Rep. (N. Y.) 541, 31 N. Y. Supp. 441, 64 St. Rep. (N. Y.) 126.

13. *McCann v. N. Y. & Q. C. Ry. Co.*, 56 App. Div. (N. Y.) 419, 67 N. Y. Supp. 748.

14. *West Chicago St. R. Co. v. Kautz*, 89 Ill. App. 309.

an hour, when the child, about four years old, wearing a bonnet, was attempting to cross the track diagonally from the direction in which the car was coming, the track being straight, the child in plain sight of the motorman, and it appearing that he saw it in time to stop the car but did not attempt to stop until the child was struck, is sufficient to sustain a judgment in favor of the plaintiff.<sup>15</sup> Testimony of a plaintiff driving across the track and colliding with a car, that when he crossed the street the car which struck his wagon was at a certain point, will be disregarded where the team, going a little faster than a walk, as testified to by him, would have been far beyond the track within the time necessary for the car coming at the highest speed testified to to have reached the place of the accident.<sup>16</sup> Where plaintiff was injured in attempting to cross a street car track through the snow, and it appeared that she lived on the east side of the street, crossed to the west side to make some purchases and recrossed at the next corner to go to a drug store, but instead of returning home on the same side, attempted to cross back to the other side because the walking was better, at a place where she testified she knew the crossing was dangerous, the exclusion of testimony that she might have returned without crossing the street is erroneous. It bears on her contributory negligence in unnecessarily exposing herself to danger.<sup>17</sup> Where plaintiff testified that she did not hear the bell before she was struck, and her sister sitting in the house near by testified that she did not hear it, the only passenger on the car not being able to say whether it rung

15. Elwood El. St. Ry. Co. v. Ross (Ind. App.), 58 N. E. 535.

16. Bornscheuer v. Consol. Tract. Co., 198 Pa. St. 332, 47 Atl. 872.

17. Newport News & O. P. Ry. & El. Co. v. Bradford, 3 Va. Sup.

15, 37 S. E. 807.

or not, but the motorman testifying that he rang the bell more than once, the conductor that his attention was attracted at the point of the accident or just before by the ringing of the bell, it was held that the evidence established the fact that the bell was rung after the motorman saw the plaintiff and before she was struck.<sup>18</sup> The duty does not rest upon a street railroad company ordinarily to keep the space between its tracks free from ice and snow; therefore, testimony in an action against it for negligence, to the effect that the ice between the tracks had been there for a considerable length of time, is incompetent.<sup>19</sup> Testimony that plaintiff was driving his wagon ahead and in the way of defendant's street car, which was moving slowly with the brakes applied and the gong sounding, and that as he turned to the right, leaving room for the car to pass, the motorman released the brakes and increased the speed, when plaintiff suddenly pulled the wagon close to the track and the motorman immediately applied the brakes, but the car collided with the wagon, does not sustain a finding that defendant was guilty of wanton negligence.<sup>20</sup> Evidence for plaintiff that but twelve feet would be required in which to stop a properly equipped car going eight miles an hour, is admissible where the negligent management of the street car colliding with him is in issue and it was claimed by defendant that the car was going eight miles an hour, although plaintiff had already shown that it took eighty feet in which to stop it.<sup>21</sup> In his verified complaint plaintiff alleged that the accident occurred on April 18th; on the trial he testified that it occurred on November

18. Ryan v. La Crosse City Ry. Co., 108 Wis. 122, 83 N. W. 770.

19. Silberstein v. Houston, etc., R. Co., 117 N. Y. 293.

20. Birmingham Ry. & El. Co.

v. Franscomb, 124 Ala. 621, 27 So. 508.

21. McDonald v. Brooklyn Heights R. Co., 51 App. Div. (N. Y.) 186, 64 N. Y. Supp. 480.

19th of the same year; on a retrial he testified that December 18th was the correct time; but defendant claimed that plaintiff had stated to one of its employees that the accident was on December 23d, and in connection with testimony thereof showed that it had a report of an accident happening in the locality of the one in question on that day; and a witness said the injured person looked like plaintiff. *Held*, that it was reversible error to exclude evidence of the circumstances of the accident last referred to.<sup>22</sup> Evidence of the omission to sound the gong is admissible as a part of the history of the transaction and as bearing upon the degree of care exercised by the defendant's employees and upon the question of the plaintiff's contributory negligence in a collision between the plaintiff and one of defendant's cars at a street crossing, where the driver of the coach in which the plaintiff was riding testified that he had observed the approach of the car when it was a block away and again when it was about half a block distant. He was then asked, with several other witnesses, whether the bell on the car was sounded when he saw it; and it was claimed that the defendant was under no obligation to ring the gong at those times.<sup>23</sup> Where the car was behind the wagon with which it collided and going in the same direction, evidence as to the capacity of the horse attached to the wagon for speed is inadmissible; and it does not tend to show the rate of speed at which the car or horse was going at the time of the accident.<sup>24</sup> The acts of the conductor of a car after it collides with the plaintiff's decedent and causes his death cannot affect the question of careless running at the time of

22. *Cunningham v. Met. St. R. Co.*, 29 Misc. Rep. (N. Y.) 123, 6a N. Y. Supp. 277.

Co., 162 N. Y. 193, 56 id. 497, revg. 38 App. Div. (N. Y.) 623.

23. *Kleiner v. Third Ave. R.*

24. *Spargo v. West End St. Ry. Co.*, 175 Mass. 174, 55 N. E. 812.

the accident. Hence, testimony as to where the conductor was after the car stopped and while the decedent was under it is incompetent.<sup>25</sup> So evidence that the driver of a street car claimed to have run into plaintiff's wagon was arrested therefor is inadmissible.<sup>26</sup> Where injury is occasioned to plaintiff standing on the sidewalk, by reason of a collision between defendant's cable car and a wagon, testimony that the driver of the wagon was also concurrently negligent is immaterial.<sup>27</sup> Where plaintiff sues for injuries from being thrown from the platform of a crowded street car, it is admissible to show that he was intoxicated at the time.<sup>28</sup> The declaration of a motorman at the place of and a few moments after the collision in which the plaintiff was injured to the effect that he had seen plaintiff for 150 yards and that he made no effort to apply the brakes until the collision was about to occur, although plaintiff had given no heed to repeated signals of the car's approach, was held admissible as part of the *res gestæ*.<sup>29</sup> In New York it is held that declarations of a street car conductor after an accident and forming no part of the *res gestæ* are not binding on the company and are inadmissible against it.<sup>30</sup> In an action for injuries to a bicycle rider in a collision with a street car, it is error to allow defendant's witnesses to state how long it would take them to dismount from a bicycle on meeting an approaching team, as the inquiry should have

25. Wilcox v. Wilmington City Ry. Co. (Del. Super.), 2 Penn. 157, 44 Atl. 686.

26. Seipp v. D. D., etc., Co., 45 App. Div. (N. Y.) 489, 61 N. Y. Supp. 409; Maisels v. D. D., etc., Co., 16 App. Div. (N. Y.) 391, 45 N. Y. Supp. 4.

27. Knoll v. Third Ave. R. Co., 46 App. Div. (N. Y.) 527, 62 N. Y.

Supp. 16; affd., 60 N. E. 1113, 168 N. Y. 592.

28. Donoho v. Met. St. Ry. Co., 30 Misc. Rep. (N. Y.) 433, 62 N. Y. Supp. 523.

29. Floyd v. Paducah Ry. & L. Co. (Ky. Ct. App.), 64 S. W. 653, 23 Am. & Eng. R. Cas. 167.

30. Kay v. Met. St. Ry. Co., 163 N. Y. 447, 57 N. E. 751.

been confined to what it would be reasonably practicable for the ordinary rider to do under the circumstances.<sup>31</sup> Where the complaint simply charges negligence, evidence of a willful intent to injure or reckless disregard of plaintiff's safety has been held inadmissible.<sup>32</sup> A complaint alleging that plaintiff "sustained severe injuries upon her left foot, left arm, left side of her head, and her entire left side, compelling and necessitating said plaintiff to remain confined to her bed under the care" \* \* \* "of a physician from the day of such injuries, and is still under the care, charge, and control of a physician" \* \* \* "to alleviate her pains and sufferings," authorizes testimony that plaintiff sustained an injury to her left ear.<sup>33</sup> Testimony that defendant's car was running fast and the motorman, when within 125 feet of a child which was approaching the track, heard a woman scream in the second story and looked in that direction and then looked back into the car and did not discover the child he struck until close upon it, is sufficient to support a finding that he was negligent.<sup>34</sup> Where the question is whether defendant owned and operated the car causing the injury, testimony of a witness for the plaintiff to the effect that he knew of his "own knowledge that this was a car of the defendants," is admissible.<sup>35</sup> Testimony of previous accident is competent only where the conditions are the same.<sup>36</sup> In an action by a mother to recover for the loss of her infant

31. *Palmer v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 95 N. W. 756.

32. *McClelland v. Chippewa Val. El. Ry.* (Wis.), 85 N. W. 1018.

33. *Radjaviller v. Third Ave. R. Co.*, 58 App. Div. (N. Y.) 11, 68 N. Y. Supp. 617.

34. *Fullerton v. Met. St. R. Co.*,

63 App. Div. (N. Y.) 1, 71 N. Y. Supp. 326.

35. *Karrigan v. Ninth Ave. R. Co.*, 44 App. Div. (N. Y.) 116, 60 N. Y. Supp. 682.

36. *Morrow v. Westchester El. R. Co.*, 54 App. Div. (N. Y.) 592, 67 N. Y. Supp. 21.

daughter's services and earnings, caused by the alleged negligence of the defendant, and also medical and surgical expenses incurred by her in the treatment of her daughter's injuries, it is fatal error to admit in evidence the complaint and judgment in an action in which the daughter had already recovered a large judgment against one of the defendants for her personal injuries, in the absence of proof that in that action testimony of the medical and surgical expenses had been given.<sup>37</sup> A guessing of medical experts, based upon inaccurate hypothetical questions, to the effect that a broken bone in the ankle which did not perforate the skin caused septic pneumonia four and one-half months after an accident, furnishes insufficient support for a verdict of a jury awarding damages against the negligent party for the resulting death.<sup>38</sup> It is not incumbent upon a street railway company to notify one using a street that steam was being generated in an engine of a steam roller used in the repairing of defendant's tracks and was likely to escape at any time with such a noise as would frighten horses; nor was it incumbent upon the company to prevent the escape of steam by banking the fire. Therefore, there is insufficient evidence to establish actionable negligence on the part of the defendant where it only appeared that the plaintiff (engaged in carting merchandise to a building) before stopping at the building saw the steam roller, then perfectly motionless and noiseless, not emitting any steam; afterward, while engaged in unloading the merchandise, the steam commenced to escape through the automatic safety-valve of the roller, making a sharp, popping noise, which frightened the horse and caused injuries to the

37. Sondheim v. Brooklyn Heights R. Co. & Nassau Brewing Co., 36 Misc. Rep. (N. Y.) 339.

38. Seifter v. Brooklyn Heights R. Co., 169 N. Y. 254.

plaintiff in an attempt to catch him.<sup>39</sup> In an action by a fireman who received injuries from collision with a car at a street intersection, he being driven back from a fire upon the hose-cart or tender, a witness in his behalf who saw the accident cannot give his opinion, based upon the relative positions and speed of the car and of the tender, as to which of them could first have crossed the point of collision.<sup>40</sup> A motorman called as an expert upon the part of the defendant, who has testified generally what he would do if an "emergency" presented itself, may properly be asked upon cross-examination what he would do in a particular case if he were in charge of the motive power of a car, and saw children ahead on the track.<sup>41</sup> An expert motorman is competent to testify as to the distance within which a car could be stopped in a locality with which he has been familiar.<sup>42</sup> One who has been driver of a horse car for years may testify within what time or space a cardriver could stop a one-horse car when the horse was on a moderate trot on level ground. So, one who has been driver of a truck for years may state within what time and what space a loaded truck could be stopped.<sup>43</sup> Evidence of the surrounding circumstances to show that the failure of the cardriver to sound the bell was negligence is admissible.<sup>44</sup> Where it appeared that the person in collision died of cerebral hemorrhage, an expert may

39. *Rector v. Syracuse R. T. R. Co.*, 66 App. Div. (N. Y.) 395.

40. *Galligan v. Met. St. Ry. Co.*, 33 Misc. Rep. (N. Y.) 87.

41. *Howell v. Rochester Ry. Co.*, 24 App. Div. (N. Y.) 502, 49 N. Y. Supp. 17.

42. *Tholan v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 283,

63 St. Rep. (N. Y.) 269, 30 N. Y. Supp. 1081.

43. *O'Neill v. D. D., etc., R. Co.*, 59 Super. Ct. (N. Y.) 123, 36 St. Rep. (N. Y.) 934, 15 N. Y. Supp. 84.

44. *Coyle v. Third Ave. R. Co.*, 17 Misc. Rep. (N. Y.) 282, 40 N. Y. Supp. 362.

be asked to state whether or not in his opinion the hemorrhage "may or may not be caused by a fall from a wagon into the street in consequence of a collision with a trolley car," where it was claimed that the accident was thus occasioned.<sup>45</sup> Section 834 of the New York Civil Code does not preclude the testimony of a surgeon connected with the hospital ambulance to the effect that the plaintiff in an action against a street railroad company for injuries had stated to him that he had slipped from his wagon while trying to get on to it, and that the wagon ran over him and his injuries were so occasioned. It is a question, however, under that section, whether the surgeon who treated the plaintiff at the hospital can testify as to the reply made by the plaintiff to him in response to his inquiry for a history of the accident and as to how it happened, where it appears that it was the uniform custom at the hospital to get a full history of each accident, including the question of how the accident occurred.<sup>45a</sup> A physician who first saw the plaintiff four months after the injury complained of, may properly be allowed to state what he found upon his examination of the plaintiff, since it cannot be determined until he has answered the question whether the conditions which he found were or were not caused by the accident, no objection appearing to have been taken under section 834 of the Civil Code.<sup>45b</sup> It is not competent to ask whether defendant's motorman was ringing his gong on approaching a crossing, in an action for personal injuries, as the question calls for a mere evidentiary fact and not a controlling question of fact.<sup>45c</sup> It is competent to show

45. Bruss v. Met. St. R. Co., 66 App. Div. (N. Y.) 554.

Heights R. R. Co., 68 App. Div. 200.

45a. Griebel v. The Brooklyn Heights Ry. Co., 68 App. Div. 204.

45c. Chicago City Ry. Co. v. Olis (Ill.), 61 N. E. 459.

45b. Napier v. The Brooklyn

that the injury resulting from defendant's negligence was aggravated by improper treatment of medical attendants through no fault of the injured party or lack of care on her part in selecting attendants.<sup>45d</sup> Evidence as to the use of the street by the public as a pass-way is not admissible, where the track, though an extension of a street railroad, was not in the highway, and such use gave the public no right thereto.<sup>45e</sup> Where the defense of the company was that the claim of plaintiff was fraudulent and evidence had been received that plaintiff's daughter had an accident claim against the city, and her husband two such claims pending, it was legitimate argument for the defendant to state to the jury that it was apparent from the testimony that plaintiff and her witnesses were in the habit of bringing damage suits, and it was to be considered as bearing on their good faith, and that they could not make their living in that sort of way.<sup>45f</sup>

**§ 36. Questions for jury in such actions.**—As has been seen, the question whether the employees of the street railroad company in the management of the car on the one hand, and the traveler on the other, use the ordinary care of reasonably prudent persons to avoid the collision, is for the jury. It cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict; so long as a question of fact exists, it is for the jury and not for the court.<sup>46</sup> Within the scope of this work it is impossible to

45d. Chicago City Ry. Co. v. Cooney, 95 Ill. App. 471.

45e. Floyd v. Paducah Ry. & L. Co. (Ky.), 64 S. W. 653.

45f. Wheeler v. Detroit El. Ry.

Co. (Mich.), 87 N. W. 886; 8 Det. L. N. 812.

46. McDonald v. Met. St. Ry. Co., 167 N. Y. 66, 69; Smith v. Met. St. Ry. Co., 66 App. Div. (N. Y.) 600.

state in detail the facts and circumstances which in various cases have been submitted to the jury in actions to recover for injuries against street railroad companies on the claim that the defendant was negligent. Recent cases which have been submitted to the jury are collated in this note.<sup>47</sup>

**§ 37. Instructions to jury in such actions.—**An instruction "that if the defendant's employees operating the car fail to

47. Ludecke v. Met. St. Ry. Co., 32 Misc. Rep. (N. Y.) 635, 66 N. Y. Supp. 483; Conyngham v. Erie El. M. Co., 15 Pa. Super. Ct. 573; Kissock v. Consol. Tract. Co., id. 103; Mertz v. Detroit El. Ry. Co. (Mich.), 83 N. W. 1036, 7 Det. Leg. N. 393; West Chic. St. R. v. Shiplett, 85 Ill. App. 683; Creavin v. Newton St. Ry. Co. (Mass.), 57 N. E. 994; Raulston v. Phila. Tract. Co., 30 Pa. Super. Ct. 412; Ryan v. Detroit Citizens' Ry. Co. (Mich.), 82 N. W. 278; Fielders v. North Jersey St. Ry., 50 Atl. 533; Lewis v. Cincinnati St. Ry. Co., 10 Ohio S. & C. P. Dec. 53; North Chicago St. R. Co. v. Zeiger, 182 Ill. 9, 54 N. E. 1006; Thompson v. United Tract. Co., 193 Pa. St. 555, 44 Atl. 558; Kelley v. Pittsb. & B. Tract. Co., 10 Pa. Super. Ct. 644; Hicks v. Nassau El. Ry. Co., 47 App. Div. (N. Y.) 479, 62 N. Y. Supp. 597. As to seeing electric wire hanging down and avoiding danger, see Lloyd v. City & Suburban Ry. Co. (Ga.), 35 S. E. 170; Central Ry. Co. v. Knowles, 191 Ill. 241, 60 N. E. 829; Oddie v. Mendenhall (Minn.), 86 N. W. 881; Markey v. Consol. Tract. Co., 48 Atl. 1117; Morris v. Met. St. Ry. Co., 63 App. Div. (N. Y.) 78, 31 N. Y. Supp. 321;

Macon v. Paducah St. Ry. Co. (Ky.), 62 S. W. 496; Chicago City Ry. Co. v. Mager, 185 Ill. 336, 56 N. E. 1058; Floyd v. Paducah Ry. & L. Co., 23 Am. & Eng. R. Cas. 167, 64 S. W. 653; Mitchell v. Third Ave. R. Co., 62 App. Div. (N. Y.) 371, 70 N. Y. Supp. 1118; Halliday v. Brooklyn Heights R. Co., 59 App. Div. (N. Y.) 57, 69 N. Y. Supp. 174; Tate v. Buffalo Ry. Co., 55 App. Div. (N. Y.) 507, 67 N. Y. Supp. 403; Griffiths v. Met. St. Ry. Co., 63 App. Div. (N. Y.) 86, 71 N. Y. Supp. 406; Duncan v. Union Ry. Co., 39 App. Div. (N. Y.) 497, 57 N. Y. Supp. 326; Devine v. Brooklyn Heights R. Co., 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 626; Pohle v. Second Ave. R. Co., 13 App. Div. (N. Y.) 393, 42 N. Y. Supp. 1092; McGrane v. Flushing & C. P. El. Ry. Co., 13 App. Div. (N. Y.) 177, 43 N. Y. Supp. 385. Where the child injured is six years of age it is a question of fact for the jury to determine whether she was in the exercise of proper care, taking into consideration its tender years, negligence and other circumstances of the case. Chicago City Ry. Co. v. Tuohy, 95 Ill. App. 314.

give timely warning of the approach of the car to a crossing as required by the rules of defendant, or as was necessary for the safety of vehicles crossing the tracks, and that in any of the respects referred to, defendant's employees were not exercising ordinary care, then the verdict should be for plaintiff," is not erroneous, as it does not substitute the rules of defendant as the test of negligence.<sup>48</sup> Although there is no allegation or proof that the switch by way of which a street car ran off its proper track and collided with plaintiff's vehicle was improperly constructed, an instruction as to its location, construction, and maintenance is proper, where defendant introduced evidence to the effect that it was in perfect condition.<sup>49</sup> An instruction that the negligence complained of was "in the following particulars," followed by a statement of the allegations of all but two counts of the complaint, and also followed by a further charge that the burden of proof was on plaintiff to prove by a preponderance of the evidence the negligence of defendant in some of the particulars charged in the petition, does not submit to the jury a consideration of the negligence alleged in the omitted counts.<sup>50</sup> In the absence of evidence upon which it can be predicated, it is error to charge that though plaintiff stepping on the track failed to look and listen, she could recover if by looking and listening she could neither have seen nor heard the approaching car, where there was no evidence on which it could be predicated. It is also error to charge that she could recover if her injury "was caused by defendant's servants" and without want of ordinary care on her part.<sup>51</sup> It is error to charge that though

48. Hart v. Cedar Rapids & M. C. R. Co. (Iowa), 80 N. W. 662.

49. Nashville St. R. v. O'Brien (Tenn.), 55 S. W. 300.

50. Hart v. Cedar Rapids & M. C. R. Co. (Iowa), 80 N. W. 662.

51. Richmond Tract. Co. v. Hildebrand (Va.), 34 S. E. 888. And

plaintiff and the driver did not look they were not guilty of contributory negligence if a person exercising ordinary care, who had looked, would have considered it safe to cross the track because the car was so far away.<sup>52</sup> Under the circumstances of the case, held proper to refuse a request to charge that in determining whether or not the defendant was in the exercise of due care, the jury could take into consideration the fact that defendant had a right of way superior to all other persons at places other than street crossings.<sup>53</sup> Where there was no evidence that there were any vehicles in the street at the time of the accident, an instruction as to the duty of the motorman "considering the number of persons and vehicles on the street," is erroneous.<sup>54</sup> It is error to refuse instructions properly stating the issues, which were not fully stated elsewhere in the charge.<sup>55</sup> Nor can the jury properly be instructed in effect, that if the plaintiff was prudent, the accident occurring was the fault of the defendant. So held where the injury was to a cab by collision with defendant's street cars.<sup>56</sup> A refusal to charge that the burden of proving negligence on the part of defendant and freedom from negligence on the part of plaintiff rests on the plaintiff, and if the evidence of such negligence and freedom from negligence is evenly balanced, the verdict must be for the defendant, con-

see Fejdowski v. D. & H. C. Co., 168 N. Y. 500.

52. Dummer v. Milwaukee El. Ry. & L. Co., 108 Wis. 589, 84 N. W. 853.

Refusal to charge that if the jury believe certain evidence, the plaintiff was guilty of contributory negligence, held proper in Birmingham Ry. & El. Co. v. Pinckard (Ala.), 26 So. 880; Bradley v.

Borough of Yeadon (Pa. C. P.), 8 Del. Co. Rep. 3.

53. North Chicago St. Ry. Co. v. Smadraff, 189 Ill. 155, 59 N. E. 527.

54. Day v. Citizens' Ry. Co., 81 Mo. App. 471.

55. West Chicago St. R. Co. v. Kautz, 89 Ill. App. 309.

56. Jones v. Third Ave. R. Co., 34 Misc. Rep. (N. Y.) 201, 68 N. Y. Supp. 832.

stitutes reversible error.<sup>57</sup> An instruction on the theory of sudden exigency or emergency of the business is properly refused in an action for a lineman's death, where it appeared that he ascended the railway company's pole and was killed by contact with a charged wire, when the same work could have been done by ascending the telephone company's pole thirty feet distant where he could have avoided contact with the wires of the railroad company.<sup>58</sup> In the absence of evidence of ordinary speed of defendant's electric cars, an instruction that if the car was being managed with ordinary care and was running at the ordinary speed of electric cars lawfully authorized to be operated on the streets of the city plaintiff could not recover, is properly refused.<sup>59</sup> An instruction that if plaintiff attempted to hurry across the street in front of the rapidly approaching car he assumes the risk of collision was held properly refused.<sup>60</sup> An instruction ignoring the question of the speed at which the car was running, where speed might have been an element of negligence, is erroneous.<sup>61</sup> It is error to charge that defendant is liable if the jury find that "collision *can be* attributed to the want of reasonable care" on its part.<sup>62</sup> An instruction which eliminates from consideration plaintiff's mental suffering and humiliation from an assault by a street railroad company's employee is erroneous.<sup>63</sup>

57. *Newcomb v. Met. St. R. Co.*, 34 Misc. Rep. (N. Y.) 203, 68 N. Y. Supp. 780.

58. *Jackson & S. St. R. Co. v. Simmons* (Tenn.), 64 S. W. 705.

59. *Fullerton v. Met. St. R. Co.*, 63 App. Div. (N. Y.) 1, 71 N. Y. Supp. 326.

60. *Scannell v. Boston El. Ry. Co.*, 176 Mass. 170, 57 N. E. 341.

And see *Geoghegan v. Third Ave. R. Co.*, 51 App. Div. (N. Y.) 369, 64 N. Y. Supp. 630.

61. *Wilson v. Memphis St. R. Co.*, 105 Tenn. 74, 58 S. W. 334; *Traver v. Spokane St. R. Co. (Wash.)*, 65 Pac. 284.

62. *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 988.

63. *Birmingham Ry. & El. Co.*

**§ 38. Damages in such cases.**— The measure of damages and the rules for ascertaining the proper measure are no different in actions based upon negligence against street railroad companies than in other negligence cases, and it is impossible to treat of the subject exhaustively here. In a recent case in New York a verdict of \$6,500 was held excessive and reduced to \$4,000, although plaintiff complained of an impaired ability to work, stiffness in his back and legs, that his hearing and eyesight were impaired, his nervous system affected, he was troubled with insomnia, and an expert who examined him diagnosed his trouble as a sprain of the spine with a degree of spinal curvature that might be permanent, where it appeared that he was a foreman in the city's service, incapacitated by his injuries for less than two months, and after returning to duty received a vacation for ten days, and thereafter continued to do full service and to receive full pay, and had submitted to, and successfully passed, a physical examination for promotion and had attempted, although he partially failed in, the difficult athletic feats required by the examination.<sup>64</sup> In another case where the plaintiff was a skilled laborer and had another trade, and at the time of his injuries was forty years of age and able to earn \$25 per month when working by the month or about \$1.50 per day, and he was permanently injured so that he could not work, a verdict of \$8,000 was reduced to \$5,000.<sup>65</sup> A verdict in favor of a woman for \$3,500 was set aside upon the ground of surprise, where she had been examined twelve days after the injury by

v. Ward, 124 Ala. 409, 27 So. 471.  
And see Nashville St. R. Co. v.  
O'Bryan (Tenn.), 55 S. W. 300.

64. Mullady v. Brooklyn Heights  
R. Co., 65 App. Div. (N. Y.) 549.

65. Jones v. Niagara Junction  
Ry., 64 App. Div. (N. Y.) 24, 71  
N. Y. Supp. 647.

the company's surgeon and made no reference to any injury of her groin, and yet claimed and recovered upon the trial of her action more than eighteen months afterward, that she had a large hernia caused by the accident.<sup>66</sup> On the other hand, a verdict was set aside as inadequate which was predicated upon the reasonable expenses of medical attendance upon the plaintiff made necessary by his injuries, yet had allowed nothing for the injuries themselves.<sup>67</sup> An award of \$15,000 in an action for killing a physician about fifty years of age, in receipt of an annual income of about \$2,000, was held not excessive.<sup>68</sup> Where it appeared that a woman about thirty-one years of age, in good health, capable of earning her own living, sustained a fracture of three ribs on one side, a contusion on her shoulder and head from which she suffered continually to the time of the trial, some seventeen months after the accident, and was short of breath and unable to work; and also that there was a general deterioration in her health, which a physician testified might result from her injuries, the court refused to set aside a verdict for \$4,500.<sup>69</sup> A verdict for \$11,000 was held not excessive, it appearing that the plaintiff was a railroad fireman, strong, in good health, receiving a salary of \$80 to \$90 a month, and was permanently and seriously injured through the negligence of the defendant over nine years before the trial; his right arm having been rendered practically useless and he being unable to earn anything for a long time after the injury and having earned only \$2,400 during the nine years, and still being in

66. *Dixon v. Brooklyn Heights R. Co.*, 35 Misc. Rep. (N. Y.) 422.

67. *Katz v. Brooklyn Heights R. Co.*, 35 Misc. Rep. (N. Y.) 302, 71 N. Y. Supp. 744.

68. *Ericius v. Brooklyn Heights R. Co.*, 64 App. Div. (N. Y.) 618, 71 N. Y. Supp. 596.

69. *Ivey v. Brooklyn Heights R. Co.*, 71 N. Y. Supp. 633.

need of medical services.<sup>70</sup> A verdict of \$12,000 more than compensates the next of kin of a healthy, bright and industrious boy aged twelve years and earning three dollars a week, which he turned over to his mother, for his death caused by the negligence of a corporation, and the verdict was reduced to \$7,500.<sup>70 $\frac{1}{2}$</sup>  A verdict of \$3,500 will not be set aside as excessive, where it appeared that in consequence of the defendant's negligence the plaintiff's left leg has become an inch shorter than the right, the cartilage of the hip joint is wasting away, and that he has become the victim of a gradually progressive disease, permanent in character, which will ultimately destroy the cartilage that covers the neck of the thigh bone and tend to cripple him more and more.<sup>70 $\frac{3}{4}$</sup>

70. Baird v. N. Y. C. & H. R. R. Co., 64 App. Div. (N. Y.) 14,

71 N. Y. Supp. 735.

70 $\frac{1}{2}$ . McDonald v. Met. St. R. R. Co., 36 Misc. (N. Y.) 703.

70 $\frac{3}{4}$ . Napier v. Brooklyn Heights R. R. Co., 68 App. Div. 200.

## CHAPTER VI.

### Operation Continued; and herein of the Rights and Duties of the Company in its Relation to Passengers; and also to Employees.

- SECTION 1. Measure of care required generally.  
2. Statute and municipal regulation.  
3. Roadbed and track.  
4. Cars and appliances.  
5. Inspection.  
6. Rules adopted by the company.  
7. Rates of fare.  
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9. Contract limiting liability.  
10. When relation of carrier and passenger commences.  
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13. Duty of motorman, etc., in management of car.  
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22. Damages for failure to carry passenger.  
23. Assault, etc., upon passenger by employee.  
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26. Care of parcels left in car.  
27. False arrest.  
28. Injury to passenger in collision with other vehicle.  
29. Position of apparent peril.  
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#### Contributory Negligence.

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**Pleading and Practice.**

39. Pleading.
40. Burden of proof.
41. Questions of evidence in actions for injury to passenger.
42. Questions for jury in such cases.
43. Instructions to jury in such cases.
44. Damages in such cases.

**§ 1. Measure of care required generally.—** Street surface railroad companies are common carriers of passengers; and while they do not insure their passengers against all hazards incident to their transportation, they are required to exercise, through their servants, a very high degree of care and skill to see to it that no injury results to a passenger in the transportation.<sup>1</sup> This rule is to be applied, not only to the main-

i. Koehne v. N. Y. & Q. C. R. Co., 32 App. Div. (N. Y.) 419; affd., 165 N. Y. 603, 58 N. E. 1089; Lincoln St. R. Co. v. McClelland, 54 Nebr. 672, 74 N. W. 1074; Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898, 3 Am. Rep. 581; Topeka City R. Co. v. Higgs, 38 Kan. 375; Meier v. Pa. R. Co., 64 Pa. St. 225; Bosqui v. Sutro Ry. Co., 131 Cal. 390, 63 Pac. 682; Houston & T. C. R. Co. v. Iseo (Tex. Civ. App.), 60 S. W. 313; West Chicago St. R. Co. v. Kromshinsky, 185 Ill. 92, 56 N. E. 1110; Hansen v. North Jersey St. Ry. Co. (N. J.), 46 Atl. 718; Holmes v. Ashtabula R. T. Co., 10 O. C. D. 638; Grace v. St. Louis R. Co., 156 Mo. 295, 56 S. W. 1121; Central of Ga. Ry. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202; Mayor v. Oregon Short Line Co. (Utah), 59 Pac. 522; Smedley v.

Hestonville, M. & F. Pass. R. Co., 184 Pa. St. 620, 39 Atl. 544, 9 Am. & Eng. R. Cas. (N. S.) 649, 42 W. N. C. 169; Baltimore City Pass. R. Co. v. Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; Scott v. Bergen Co. Tract. Co., 48 Atl. 1118, affg. 63 N. J. L. 407, 43 Atl. 1060; Keegan v. Third Ave. R. Co., 165 N. Y. 622, 59 N. E. 1124; E. Omaha St. R. Co. v. Godola, 50 Nebr. 960, 70 N. W. 491, 7 Am. & Eng. R. Cas. (N. S.) 300; Ill. C. R. Co. v. Davidson (C. C. App. 7th C.), 76 Fed. 517, 46 U. S. App. 300, 22 C. C. A. 306; Parker v. Met. St. R. Co., 69 Mo. App. 54; Payne v. Spokane St. R. Co., 15 Wash. 522, 46 Pac. 1054; Posch v. Southern El. R. Co., 76 Mo. App. 601, 2 Mo. App. Rep. 10; McCurrie v. Southern Pac. R. Co., 122 Cal. 558, 5 Am. Neg. Rep. 117, 55 Pac. 324, 12 Am. & Eng. R. Cas.

tenance of the roadbed, cars, motive power, and other appliances of the corporation, but also to the conduct of the agents and servants of the corporation in the operation of the road and in the selection of their employees.<sup>2</sup> It is not liable however for an injury to a passenger from an accident which is not the reasonable, natural, and probable result of the situation, and which could not have been foreseen by the carrier

(N. S.) 170; Reynolds v. Richmond & M. R. Co., 92 Va. 400, 23 S. E. 770; Texas & P. R. Co. v. Orr (Tex. Civ. App.), 31 S. W. 696; Louisville R. Co. v. Parke, 96 Ky. 580, 29 S. W. 455; St. Louis, etc., Co. v. Sweet, 60 Ark. 550, 31 S. W. 571; O'Connell v. St. Louis Cable, etc., R. Co., 106 Mo. 482, 17 S. W. 494; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 47 Am. & Eng. R. Cas. 500, 9 So. 722; Central R. Co. v. Smith, 74 Md. 212, 21 Atl. 706; Mont. El. R. Co. v. Mallett (Ala.), 9 So. 363; Chicago City R. Co. v. Engel, 35 Ill. App. 490; So. Kansas R. Co. v. Walsh, 45 Kan. 653, 4 Am. R. & Corp. Rep. 231, 47 Am. & Eng. R. Cas. 493, 26 Pac. 45; Citizens' St. R. Co. v. Twiname, 111 Ind. 587; Holley v. Atlanta St. Ry. Co., 61 Ga. 215.

It is liable for an injury caused by its failure to exercise such care, although the negligence or misconduct of another passenger in ringing the bell as a signal for starting the car contributed to the injury. Nichols v. Lynn & B. R. Co., 168 Mass. 528, 47 N. E. 427; Pray v. Omaha St. Ry. Co., 5 Am. Electl. Cas. 407, 44 Nebr. 167, 11 Am. R. & Corp. Rep. 522, 48 Am. St. Rep. 717, 62 N. W. 447.

Where the injury was occasioned by an electric car, the court may properly charge in reference to the care required of the electric railroad company that "in the use of motive power like electricity, power of such appalling possibility, it should be a very high degree of care." Leonard v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985.

2. Hansberger v. Sedalia El. Ry. L. & P. Co., 82 Mo. App. 566; Bosqui v. Sutro R. Co., 131 Cal. 390; Macon Consol. St. R. Co. v. Barnes (Ga.), 38 S. E. 756; Kird v. New Orleans & N. W. R. Co. (La.), 29 So. 729; Chicago & A. R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698; Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860; Levi v. Campbell (Tex.), 19 S. W. 438.

If the injury would not have occurred if two men instead of one had been managing the car, the company has been held liable. Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277, 42 Pac. 822; modified however in *id.* 1063. It must use reasonable care in selecting horses for its horse cars. Noble v. St. Joseph, etc., R. Co., 98 Mich. 249, 57 N. W. 126.

in the exercise of even a high degree of care and skill.<sup>3</sup> The degree of care required in any case must have reference to the subject-matter and must be such only as a man of ordinary prudence and capacity may be expected to exercise in the same circumstances. In some cases this rule will require the highest degree of care, and in others, much less. The fact that except in boarding the car, alighting therefrom, and in taking and occupying a place therein the passenger is unable to look out for himself, is among the circumstances to be considered. The care which should be exercised in the management of cars drawn by horses is not the same as in the management of electric or cable cars propelled at a much higher rate of speed.<sup>4</sup> The situation and circumstances

3. Ayers v. Rochester R. Co., 156 N. Y. 104, 50 N. E. 960; Holt v. S. W. Mo. El. Ry. Co., 84 Mo. App. 443; Feary v. Met. St. Ry. Co. (Mo.), 62 S. W. 452; Chicago City R. Co. v. Burrell, 70 Ill. App. 60; Davis v. Chicago, M. & St. P. R. Co., 93 Wis. 470, 67 N. W. 16, 1132; Snedecker v. Nassau El. R. Co., 41 App. Div. (N. Y.) 628, 58 N. Y. Supp. 457; Denver & R. G. R. Co. v. Andrews, 11 Colo. App. 204, 53 Pac. 518; Perry v. Malarin, 107 Cal. 363, 40 Pac. 489; Hamilton v. West End St. R. Co., 163 Mass. 199, 39 N. E. 1010; Nelson v. Lehigh Val. R. Co., 25 App. Div. (N. Y.) 535, 50 N. Y. Supp. 63.

The fact that a banana peeling was on a sidewalk leading to a street railway station, on which a passenger stepped causing him to fall, is not evidence of negligence on the part of the company. Benson v. Man. Ry. Co., 31 Misc. Rep. (N. Y.) 723, 65 N. Y. Supp. 271. Or that it attempts to operate its cars

during a strike of its employees. Fewings v. Mendenhall (Minn.), 86 N. W. 96. Only such diligence as is reasonable under the circumstances can be required of the carrier when an unusual and extraordinary demand for transportation of passengers occurs. Chicago & A. R. Co. v. Fisher, 31 Ill. App. 36.

4. Unger v. Forty-second St., etc., R. Co., 51 N. Y. 497; Wanzer v. Chippewa Val. El. R. Co., 108 Wis. 319, 84 N. W. 423; Elwood v. Chicago City Ry. Co., 90 Ill. App. 397; Ehrhard v. Met. St. Ry. Co., 58 App. Div. (N. Y.) 613, 68 N. Y. Supp. 457; Palmer v. Winona Ry. & L. Co. (Minn.), 80 N. W. 869; Pryor v. Met. St. Ry. Co., 85 Mo. App. 367.

The passenger takes the risk of the usual and necessary movements of a trolley car, some of which are well known to be sudden. Brennan v. Brooklyn Heights R. Co. (N. Y.), 5 Am. Electl. Cas. 416, 12 Misc. Rep. (N. Y.) 570.

surrounding the same car at different times and places may require different degrees of care. If they are such from which grave injury might be expected they impose upon the carrier's servants the duty to exercise the utmost skill and foresight to avoid it; as, for example, where the car is followed at a distance of a very few feet by a truck proceeding rapidly and confined to the car track by the presence of vehicles on either side, the conductor of the car is bound to exercise a high degree of care in requiring a passenger to leave it;<sup>5</sup> or, where it is approaching a steam railroad crossing;<sup>6</sup> but where the driver of a horse car attempts to move or switch a car from one track to the other in order to cross a bridge then being repaired and permitting the use of only one track, and a passenger at the time claims he was injured thereby and seeks to recover against the company therefor, it is erroneous to charge the jury, under the particular circumstances of the case, that the company was bound to exercise all the care and skill which human prudence and foresight could suggest to secure the safety of their passengers.<sup>7</sup> The carrier must also protect the passenger against any injury from the willful misconduct, as well as from the negligence, of its servants, and of his fellow passengers and strangers, so far as it can be done in the exercise of reasonable care and prudence.<sup>8</sup>

5. Maverick v. Eighth Ave. R. Co., 36 N. Y. 378; Faris v. Brooklyn City N. R. Co., 46 App. Div. (N. Y.) 231, 61 N. Y. Supp. 670; Schenkel v. Pittsb. & B. Tract. Co., 194 Pa. St. 182, 44 Atl. 1072.

6. Coddington v. Brooklyn C. T. R. Co., 102 N. Y. 66. Or at a street crossing where a runaway team might have been seen. Regensburg v. Nassau El. R. Co., 58 App. Div. (N. Y.) 566, 69 N.

Y. Supp. 147; West Chicago St. R. Co. v. Manning, 170 Ill. 417, 48 N. E. 958, 9 Am. & Eng. R. Cas. (N. S.) 364.

7. Stierle v. Union Ry. Co., 156 N. Y. 70, 684, 50 N. E. 419, 834; Dickert v. Salt Lake City R. Co. (Utah), 59 Pac. 95.

8. Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798.

**§ 2. Statute and municipal regulation.**— The duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry, exists independently of contract; and although there is no contract in a legal sense between the parties, whether there is a contract to carry or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands. Therefore it is no answer in such a case to urge that the passenger was violating a statute regulation against traveling upon Sunday.<sup>9</sup> Municipal ordinances regarding the manner of operating street cars, the places at which they are to stop and how they are to approach street crossings, cannot, in the absence of any agreement by the company to be bound thereby, become the basis of liability to a passenger for personal injuries. They are however generally competent evidence upon the question of the negligence of the parties.<sup>10</sup> Even if a statute provides that no railroad corporation shall be liable for an injury to a passenger while on the platform of a car, a passenger to whom such statute is applicable, not voluntarily riding upon the platform of a crowded street car

9. Carroll v. Staten Island R. Co., 58 N. Y. 126, 133; Cleveland v. Bangor, 5 Am. Electl. Cas. 346, 87 Me. 259; Schmid v. Humphrey, 48 Iowa, 652, 30 Am. Rep. 414; Phila., etc., R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415; Norris v. Litchfield, 35 N. H. 271; Delaware, etc., Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 1 Am.

R. & Corp. Rep. 688; Baldwin v. Barney, 12 R. I. 392, 34 Am. Rep. 670; Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; McDonough v. Met. R. Co., 137 Mass. 210; Swisher v. Williams (Ohio), Wright, 754.

10. Byington v. St. Louis R. Co., 147 Mo. 673, 49 S. W. 876.

but required so to do because there was no other place for him in the car which by reasonable exertion he could secure, is not precluded thereby from recovering for personal injuries if they were occasioned solely by the carrier's neglect.<sup>11</sup> Such a statute with reference to getting on and off cars at the front end does not apply to a passenger who, when injured, was not getting on or off, but was riding by direction of the driver on the steps of the front platform.<sup>12</sup> Passengers, as well as the carrier, must take notice of municipal ordinances regulating the management of cars upon the street railroads within the city; so, where an ordinance required street cars moving west to stop on the west side of the street to discharge passengers and also compelled them to stop on the east side until signaled by the flagman to cross, the company is not bound on stopping on the east side to give warning of its car starting to cross the street, unless of course it know a passenger to be in peril.<sup>13</sup> As has been seen, municipalities are generally given power to make reasonable ordinances to govern the operation of street railroads within their limits. So, a city may, by ordinance, require tickets to be kept for sale upon street cars; and it may also fix and determine the rate of fare; that is to say, such an ordinance would not be regarded as unreasonable if within the statutory grant of power.<sup>14</sup> An electric railroad partly in the District of Columbia and partly in Maryland is subject

11. *Morris v. Eighth Ave. R. Co.*, 68 Hun (N. Y.), 39, 52 St. Rep. (N. Y.) 61, 22 N. Y. Supp. 666.

12. *Seymour v. Citizens' R. Co.*, 114 Mo. 266, 58 Am. & Eng. R. Cas. 395, 21 S. W. 739.

13. *Pryor v. Met St. R. Co.*, 85 Mo. App. 367. And see *North*

*Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360.

14. *Sternberg v. State*, 36 Nebr. 307, 56 Am. & Eng. R. Cas. 424, 19 L. R. A. 570, 54 N. W. 553, 7 Am. R. & Corp. Rep. 579; *Detroit v. Fort Wayne & B. I. R. Co.*, 95 Mich. 456, 20 L. R. A. 74, 54 N. W. 958.

to the Inter-State Commerce Act, although constructed on public highways and evidently a street surface road for the convenience of urban and suburban passengers.<sup>15</sup>

**§ 3. Roadbed and tracks.**—A railroad company is bound to furnish for its passengers a reasonably safe and sufficient track and equipments, and to maintain them in a reasonably safe condition, so far as can be provided by the utmost human skill, diligence, and foresight, and is liable to a passenger for slight negligence in any of these respects by which injury to him is occasioned.<sup>16</sup> Notice of a patent defect in its track

15. Willson v. Rock Creek R. Co., 7 Inters. Com. Rep. 83.

16. Morris v. N. Y. C. & H. R. R. Co., 106 N. Y. 678, 13 N. E. 455; Palmer v. D. & H. C. Co., 120 id. 170, 24 N. E. 302; Stierle v. Union Ry. Co., 156 N. Y. 70, 5 Am. Cas. 326, 50 N. E. 419; Ill. Central R. Co. v. Kuhn (Tenn.), 64 S. W. 202; St. Louis & S. F. R. Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883; Holloway v. Pasadena & P. Ry. Co., 130 Cal. 177, 62 Pac. 478; Byrne v. Brooklyn City & Newtown R. Co., 6 Misc. Rep. (N. Y.) 260, 58 St. Rep. (N. Y.) 127, 26 N. Y. Supp. 760; affd., 145 N. Y. 619, 65 St. Rep. (N. Y.) 865, 40 N. E. 163. (Upon the trial it was also held that evidence of the condition of the track on a subsequent day is admissible where it is shown that its condition is the same at the time of the trial as at the time of the accident.) Daub v. Yonkers R. Co., 69 Hun (N. Y.), 138, 52 St. Rep. (N. Y.) 527, 23 N. Y. Supp. 268. A street railroad company owns no interest in

the soil of the highway through which its road passes which may be taxed as real estate; but the inherent value of its property above the cost of reproducing the material constituents of its line is subject to State, but not to municipal, taxation. Mayor, etc. of Newark v. State Board of Taxation (N. J. Err. & App.), 24 Am. & Eng. R. Cas. (N. S.) 442, 51 Atl. Rep. 67. And see as to taxation, Newport News & O. P. Ry. & El. Co. v. City of Newport News (Sup. Ct. of App., Va.), 40 S. E. 645, 24 Am. & Eng. R. Cas. (N. S.) 453. As to the right to condemn right of way for connecting with tracks of another company, see Suburban R. Co. v. Met. West. Side El. R. Co., 24 Am. & Eng. R. Cas. (N. S.) 476, 61 N. E. 1090. It is an additional servitude to operate a street railway upon a street for the transportation of freight, and an abutting owner is entitled to damage for any injury thereby inflicted on his property, if the injury is not one suffered in common with other property along the

upon its street is not required; if it exist and appear to have caused the injury complained of, there is a presumption of negligence, and it is incumbent upon the company to prove circumstances showing freedom from negligence.<sup>17</sup> So, when a street car approached a point where a wall of a building was being taken down and bricks were piled by a third person in the street close to the tracks, the motorman having had his attention called thereto but disregarding them, the company was held liable for an injury occasioned

route. *Rische v. Texas Transp. Co.*, 24 Am. & Eng. R. Cas. (N. S.) 486, 66 S. W. 324. As to encroachment of one road upon another, see *Fresno St. R. Co. v. So. Pac. R. Co.*, 24 Am. & Eng. R. Cas. (N. S.) 547, 67 Pac. 773.

17. *Worster v. Forty-second St. R. Co.*, 50 N. Y. 203; *West Chicago St. R. Co. v. Stephens*, 66 Ill. App. 303, 1 Chic. L. J. Week. 389. Under a statute providing that a street railway company shall keep in repair "the paving, upper blocking, or other surface materials," of the portion of the street covered by the tracks, and if an unpaved street, an additional space of eighteen inches on each side of the tracks, it is held not to be the duty of the company to fill excavations below the surface level of the street within eighteen inches of its track in an unpaved street, the excavations being made by a sewer contractor by authority of the city, and therefore the railroad company would not be liable to one injured by reason of such excavation. *Leary v. Boston El. Ry. Co.*, 24 Am. & Eng. R. Cas. (N. S.) 481, 62 N. E. 1. Under a mu-

nicipal ordinance requiring such companies to repave and keep in repair to the satisfaction of the proper city authorities a space in the street between lines one foot outside of their outer rails, under a penalty, in an action for negligence brought against the company by a passenger who was injured through the defect in the pavement while passing from the car to the sidewalk, it cannot be contended that as the company had never paved the street, the ordinance was not applicable. *Fielders v. North Jersey St. Ry. Co.* (N. J. Sup.), 50 Atl. 533. And see *Dean v. City of Patterson*, id. 620; *City of Montreal v. Montreal City R. Co.* (Rap. Jud. Que.), 19 C. S. 504. The railroad company is bound to know that crowds will congregate on its platform at one of its stations, and the fact that one of its passengers, while awaiting a car, was pushed by a crowd upon a defective board in the platform and thus injured, does not shift the responsibility for the injury. *Indianapolis St. Ry. Co. v. Robinson* (Ind.), 61 N. E. 936.

to a passenger by the bricks being forced into the car upon the falling of part of the wall.<sup>18</sup> It is no defense either that the cars could run over the track at a certain rate of speed with safety, and that they were well equipped as compared with the equipment of other roads.<sup>19</sup> Neither is it a defense that the track was in apparently good and safe condition if there were defects rendering it unsafe, which, by the exercise of care and skill, might have been discovered and remedied.<sup>20</sup> But negligence cannot be imputed to the company, as matter of law, because a car is derailed. The derailment, however, if caused by a bad condition of the street, is evidence of negligence which, unexplained, will justify a verdict against the company.<sup>21</sup> If it be the result of an unprecedented rainfall the company must also show its freedom from

18. Buehler v. Union Traction Co. (Pa.), 49 Atl. 788. As to obstruction by snow along the tracks, see Dickson v. Brooklyn City & Newtown R. Co., 100 N. Y. 170, 3 N. E. 65. Where one enters a car, and running along its side to reach the platform, falls over such an obstruction, the question of his contributory negligence is for the jury. Mowrey v. Central City Ry. Co., 66 Barb. (N. Y.) 43. Knowing that a track is being repaired, a passenger permitted to deposit his fare and take his seat without objection from the conductor is not necessarily negligent. But if he has been warned not to board the car until he has passed the point where repairs are being made and he persists in taking the risk, he is guilty of contributory negligence. Valentine v. Middlesex R. Co., 137 Mass. 28.

19. Bosqui v. Sutro Co. R. Co., 131 Cal. 390, 63 Pac. 682.

20. Chicago, P. & St. L. R. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960.

21. Hastings v. Central Cross-town R. Co., 7 App. Div. (N. Y.) 312, 40 N. Y. Supp. 93, 29 Chic. Leg. N. 26. So, where the plaintiff, a passenger, was thrown to the floor and injured by the derailment of the car resulting from its colliding with a paving-stone which lay between the rails and was wholly or partially covered by snow and slush, it was held that it was for the jury, not for the court, to determine whether the presence of the paving-stone might not have been discovered and the accident avoided by the exercise of that high degree of care which the law imposes on common carriers for the safety of their passengers. Dusenbury v. North Hudson Co. Ry. Co. (N. J.), 48 Atl. 520.

presumptive negligence contributing to the injury.<sup>22</sup> If the injury result, however, from a defect in a public bridge over which the carrier passes, as where an iron falls from the roof overhead and injures a passenger, the occurrence, unexplained, will not warrant a verdict based on the carrier's negligence.<sup>23</sup> A street railroad company is not bound to construct its double tracks at such a distance apart that it would be utterly impossible for a passenger standing upon the side platform of an open car to be struck by a closed or

22. Ill. Central R. Co. v. Kuhn (Tenn.), 64 S. W. 202; Libby v. Maine C. R. Co., 85 Me. 34, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812, 26 Atl. 943.

23. Birmingham v. Rochester City & B. R. Co., 137 N. Y. 13, 32 N. E. 995, 7 Am. R. & Corp. Rep. 513, 18 L. R. A. 764, 49 St. Rep. (N. Y.) 888. But it is no defense in favor of a railroad company to an action for injuries to a passenger in a collision of its train with a cow outside of village limits, where the collision would not have occurred had the company fenced its track beyond, and constructed a cattle-guard at such limits, that the cow entered upon its track within the village limits at a point where the company was not bound by law to maintain a fence. Atchison, T. & S. F. R. Co. v. Elder, 149 Ill. 173, 36 N. E. 565. The New York Railroad Law, § 64, was amended by chapter 140, Laws of 1902, so as to read as follows:

§ 64. When a highway crosses a railroad by an overhead bridge, the frame work of the bridge and its abutments, shall be maintained and kept in repair by the railroad

company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality in which the same are situated; except that in the case of any overhead bridge constructed prior to the enactment of sections sixty-one and sixty-two of this act, the roadway over and the approaches to which the railroad company was under obligation to maintain and repair, such obligations shall continue, provided the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the approaches thereto, which notice must be given in writing by the commissioner of highways or other duly constituted authorities, and the railroad company shall not be liable by reason of any such defect unless it shall have failed to make repairs within ten days after the service of such notice upon it. When a highway passes under a railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the subway and its approaches shall be maintained and kept in repair by the municipality in which the same are situated.

an open car coming from the opposite direction, particularly where thousands of persons for twenty years had been seen riding on the outside steps of the open cars, at or near the spot where it was claimed that a passenger standing on the side platform of an open car was struck by a closed car on the other track, at times when they met cars coming from the opposite direction and the cars had passed each other and no one had ever been hurt, nor had any accident ever before happened there, or at any other portion of the road from any such cause.<sup>24</sup> But if at the place and time of the accident it appear that the two tracks were nearer to each other because of the sinking of a rail than at other places on the route, the carrier will be liable.<sup>25</sup> It is not negligence on the part of the railroad company to run its cars between the pillars of an elevated railroad track leaving a space of fourteen inches between one rail and a row of the pillars, the company using cars narrower than those in ordinary use.<sup>26</sup> If, without reasonable cause, a passenger leave such a car and put himself on the outside of it when in motion, he assumes the hazard of colliding with one of the pillars.<sup>27</sup> In a case recently decided by the New York Court of Appeals,

24. Craighead v. Brooklyn City R. Co., 123 N. Y. 391, 33 St. Rep. (N. Y.) 620, 25 N. E. 387. A distance of four feet between the inner rails of a public street-car track is not as matter of law so small as to be dangerous for the passengers on the cars, where such distance is the minimum authorized by the statute under which the street-car system was located. Harbison v. Met. St. R. Co., 24 Wash. L. Rep. 438, 9 App. D. C. 60. And see Kowalski v. Newark Pass. Ry. Co., 15 N. J. L. J. 50.

25. Herdt v. Rochester City & B. R. Co., 48 St. Rep. (N. Y.) 46, 65 Hun (N. Y.), 625, 20 N. Y. Supp. 346; affd., 142 N. Y. 626; Gray v. Rochester City & B. R. Co., 61 Hun (N. Y.), 212, 40 St. Rep. (N. Y.) 715, 15 N. Y. Supp. 927.

26. Murphy v. Ninth Ave. R. Co., 6 Misc. Rep. (N. Y.) 298, 58 St. Rep. (N. Y.) 140, 26 N. Y. Supp. 783; affd., 149 N. Y. 609.

27. Coleman v. Second Ave. R. Co., 114 N. Y. 609, 24 St. Rep. (N. Y.) 566, 21 N. E. 1064. On the trial below it was held that

where damages were sought to be recovered because of the carrier's negligence, it appeared that the defendant operated a street railroad in the city of Rochester upon its Lake avenue line, the tracks being located between the curb of the street and the sidewalk, and more or less close to the trees grown upon the sides of the avenue. By a traffic arrangement between the defendant and the Rochester Electric Railroad Company, the latter, operating an electric trolley road from Ontario Beach to the city line, ran its cars over the former's tracks to points within the city limits without any lease, and each company operated and managed its own train of cars; at the time of the accident the deceased was riding upon a car of the Rochester Electric Railroad Company at a point upon the defendant's Lake avenue line, and while standing upon the platform he projected his person beyond the side of the car and was struck upon the head by a tree standing within one foot and seven inches of the rail, and his death was thereby occasioned. It was held that the plaintiff's decedent sustained no contractual relation to the defendant and none such could be predicated upon the mere traffic arrangement between the two companies, which permitted the carrier of the deceased, for a compensation, to run its cars over the defendant's tracks; that the defendant had a right to construct its tracks as, and where, it did, and owed the duty of care and precaution for the safe operation of its cars only to its own passengers.<sup>28</sup> A passenger who, on alighting from the car, crosses the company's track to reach her destination, may assume that the crosswalk be-

proof that the pillar with which he collided was much nearer the tracks than was ordinarily the case, was sufficient to take the question

of the defendant's negligence to the jury. *Id.*, 41 Hun (N. Y.) 380.

28. *Sias v. Rochester Ry. Co.*, 169 N. Y. 118, 62 N. E. 132.

tween the tracks is in a safe condition, and may give her attention to cars that may be approaching; if thereby she fall into a hole in the walk and is injured, she may recover from the company.<sup>29</sup> If the company be unable to maintain its roadbed in a condition safe for passengers to step on, through the action of the city authorities in lowering the grade of the street, it is bound to inform its passengers who are about to alight that they cannot do so with safety.<sup>30</sup> If the injury to a passenger be occasioned by a collision between the car in which he is riding and another vehicle at a street crossing, the carrier cannot rely on its superior right of way as a defense. Indeed, it has no superior right of way at a crossing.<sup>31</sup> Where the occupant of a wagon driving upon a street railroad track is thrown from it by the jolt incident to turning out of the track, the company is not liable for an injury thus occasioned.<sup>32</sup> Street railroad companies are chargeable with notice of ordinances enacted for the public good and are responsible for any injury occasioned by the violation thereof by its employees.<sup>32½</sup>

29. Mahnke v. New Orleans City & L. R. Co., 104 La. 411, 29 So. 52. And see Wells v. Steinway R. Co., 18 App. Div. (N. Y.) 180, 45 N. Y. Supp. 864; Texas & P. R. Co. v. McLane, 2 Am. & Eng. R. Cas. (N. S.) 263, 32 S. W. 776; Citizens' St. Ry. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; Smith v. St. Paul City Ry. Co., 32 Minn. 1; Gilson v. Jackson Co. Horse Ry. Co., 76 Mo. 382; Richmond City Ry. Co. v. Scott (Va.), 11 S. E. 404; Cartwright v. Chic. Grand Trunk Ry. Co., 52 Mich. 606, 18 N. W. 380. But evidence of the condition of roadbed is not admissible to show negligence unless such condition is alleged in the complaint as an element of negligence. Nies v. Brooklyn Heights R. Co., 68 App. Div. (N. Y.) 259.

30. Flack v. Nassau El. R. Co., 41 App. Div. (N. Y.) 399, 58 N. Y. Supp. 839.

31. O'Neill v. D. D. E. B., etc., R. Co., 129 N. Y. 125, 41 St. Rep. (N. Y.) 107, 29 N. E. 84.

32. Nivette v. New Orleans & L. S. R. Co., 42 La. Ann. 1153, 8 So. 581.

32½. McAndrew v. St. L. & S. Ry. Co., 88 Mo. App. 97.

**§ 4. Cars and appliances.**— A street surface railroad company need not provide its cars with all known and approved machinery necessary to protect its passengers from injury. It is sufficient if it has all the appliances that are approved and in general use and generally deemed necessary, and skillful servants, for the safety of passengers.<sup>33</sup> It is bound to

33. Caveny v. Neely, 43 S. C. 70, 20 S. E. 806; Witsell v. West Asheville & S. S. R. Co., 120 N. C. 557, 27 S. E. 125; North Chicago St. R. Co. v. Wrixon, 51 Ill. App. 307; Central Vermont R. Co. v. Bateman, 26 U. S. App. 584. If a sand-box has been in use generally for many years, whether or not the car could have been stopped more easily had it then been in use is a question for the jury. Penny v. Rochester R. Co., 7 App. Div. (N. Y.) 595, 40 N. Y. Supp. 172; Sharp v. Kansas City Cable Ry. Co. (Mo.), 20 S. W. 93.

So, where the injury is occasioned to a passenger through the car's escape down an incline, if the company use the best machinery known, such as experience had shown was safe, and the accident was caused by something it could not have foreseen or guarded against, though it fails to show the immediate cause, it is not liable. Feary v. Met. St. Ry. Co. (Mo.), 62 S. W. 452. And see Wynn v. Central Park, N. & E. River R. Co., 133 N. Y. 575, 44 St. Rep. (N. Y.) 673, 30 N. E. 721. A carrier is not obliged to adopt an appliance in use by but one other corporation, where there is nothing to call its attention to the fact that its structure as it stands is insecure or unsafe. Fox v. Mayor,

etc., 70 Hun (N. Y.), 181, 53 St. Rep. (N. Y.) 902, 24 N. Y. Supp. 43. Where the injury was occasioned by a brake-handle which, becoming unfastened, whirled around rapidly and struck a passenger while she was boarding the car, and it appeared that the brake and its appliances were in good order, were in the same place as all others, and that the car was managed and the motorman conducted himself as customary in receiving and discharging large crowds; that no accident had ever happened before from such a cause, and the brake was never known before to kick loose; it was held that the company was not negligent. Holt v. S. W. Mo. El. Ry. Co., 84 Mo. App. 443. An injury occasioned to a passenger by her dress being caught on the plunger of the car, is not such as to render the company liable, it appearing that the plunger was on the car when obtained from the best builder and was in the same condition; and it not appearing that any safer appliance was in use or could be procured in the market. Smith v. Kingston City Ry. Co., 55 App. Div. (N. Y.) 143, 67 N. Y. Supp. 185; affd., 169 N. Y. ; Atwood v. Met. St. R. Co., 25 Misc. Rep. (N. Y.) 758, 54 N. Y. Supp. 138. But see West Chicago St. R. Co.

provide for the safe transportation of children of tender years as well as for that of adults.<sup>34</sup> The use of a street car without gates on the platform, in the absence of a statute forbidding such use, is not negligence which will make the company liable for injuries received by a person thrown from the car.<sup>35</sup> And the rule that a common carrier is bound to the very highest degree of care in the equipment of its road and certain of its appliances does not extend to the rods to which the curtains of its car windows are fitted; and the use of a pattern generally employed for the purpose and in which no defect discoverable by inspection exists satisfies the requirements of law.<sup>36</sup> The company may be negligent for a failure to provide the wheels of its cars with suitable guards.<sup>37</sup> Yet it has been held that it is not liable for the death of a boy who, in attempting to get upon a moving car,

v. Johnson, 180 Ill. 285, 54 N. E. 334; Weber v. Met. St. R. Co., 22 App. Div. (N. Y.) 628, 47 N. Y. Supp. 812; Chase v. Jamestown St. R. Co., 38 St. Rep. (N. Y.) 954, 15 N. Y. Supp. 35; Poulin v. Broadway, etc., R. Co., 61 N. Y. 621, affg. 34 Super. Ct. (2 J. & S.) 296.

34. Met. R. Co. v. Falvey (D. C. App.), 23 Wash. L. Rep. 53.

35. Byron v. Lynn & B. R. Co., 177 Mass. 303, 58 N. E. 1015. But the failure to keep closed gates which the company has provided upon its cars may or may not be negligence, according to the circumstances. Augusta R. Co. v. Glover, 92 Ga. 132, 58 Am. & Eng. R. Cas. 269, 18 S. E. 406. It was also held, in an action for the death of a passenger in alighting upon the side next to a parallel track,

while the gate was open, that it was no defense that other street-car lines, operating on other street-car tracks, in other cities, do not use gates for that purpose. And see Gaffney v. Brooklyn City R. Co., 6 Misc. Rep. (N. Y.) 1, 58 St. Rep. (N. Y.) 119, 25 N. Y. Supp. 996.

36. Leyh v. Newburgh El. Ry. Co., 41 App. Div. (N. Y.) 218, 58 N. Y. Supp. 479, 6 Am. Neg. Rep. 361; affd., 168 N. Y. 667, 61 N. E. 1131. The fall of a fire extinguisher fastened to a side of a car about twenty inches above the head of a passenger is *prima facie* evidence of the carrier's neglect. Allen v. United Tract. Co., 73 N. Y. Supp. 737.

37. Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 5 Am. & Eng. R. Cas (N. S.) 393, 45 Pac. 996.

falls off and is run over and killed by the wheels of a trailer, although the wheels of the trailer are not provided with such guards as are in common use.<sup>38</sup> Indeed, it may be said generally that its failure to provide its cars with a safety device designed solely for the protection of passengers and employees is not available to one standing in neither of such relations.<sup>39</sup> It cannot be held negligent because a bolt used to fasten the step projects underneath so that it scrapes the leg of a passenger who falls from the platform.<sup>40</sup> But it is bound to anticipate the increased difficulty in keeping control of its cars when its tracks are slippery with snow, and is liable for an injury due to running down a grade at such a high speed, under such conditions that control of the car was lost after the wheels were locked by the brakes.<sup>41</sup> It should see that snow is removed from the step of its car where a passenger would be likely to slip upon it.<sup>42</sup> It is not erroneous to say that a carrier by electric car is bound to use the very highest degree of care to see that the electric appliances in use on the car do not get out of order and so endanger the safety of passengers.<sup>43</sup> A passenger need not

38. West Chicago St. R. Co. v. Binder, 51 Ill. App. 420.

39. Schepers v. Union Depot R. Co., 5 Am. Electl. Cas. 398, 126 Mo. 665, 2 Am. & Eng. R. Cas. (N. S.) 9, 29 S. W. 712.

40. Posten v. Denver Consold. Tramway Co., 11 Colo. App. 187, 53 Pac. 391. It is liable to one injured in consequence of a wheel box or guard projecting through the floor, which, to the knowledge of the person in charge of the car, was so out of repair as to be liable to trip or throw passengers alighting from the car. Chase v. James-

town St. R. Co., 38 St. Rep. (N. Y.) 954, 15 N. Y. Supp. 35. And see Kelly v. N. Y. & C. B. Ry. Co., 109 N. Y. 44.

41. Danville St. Car Co. v. Payne (Va.), 24 S. E. 904.

42. Gilman v. Boston & M. R. Co., 168 Mass. 454, 47 N. E. 193; Neslie v. Second & Third St. Ry. Co., 113 Pa. St. 300.

43. Leonard v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269; Cogswell v. West St. & N. E. El. R. Co., 5 Wash. 46,

be on the lookout to avoid danger from defects in the carrier's appliances, and is not negligent unless he fail to use ordinary care after knowledge of the defect or peril.<sup>44</sup> So, where a woman suffered injuries by the collapse under her weight of a trapdoor in the floor of the platform of a street car as she was about to alight, she may recover for her injuries against the carrier, although she knew that the car had been stopped and the trapdoor raised a short time before, where the car had resumed its journey in the interval and no warning was given to the passengers of any defect.<sup>45</sup>

**§ 5. Inspection.**—While the carrier is not an insurer of the safety of passengers against accident, it must so inspect its cars and appliances as, in the judgment of those who understand the subject, will be sufficient to insure the safety of its passengers from accident.<sup>46</sup> It is liable for injuries sustained

52 Am. & Eng. R. Cas. 500, 7 Am. R. & Corp. Rep. 48, 31 Pac. 411; Burt v. Douglas Co. St. R. Co., 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479. If the injury to the passenger be caused by contact with a trolley wire charged with electricity, which breaks and falls over the rear end of the car, the break being caused solely by a hidden or latent defect in the wire which could not have been discovered or detected by any reasonable examination, the carrier is not liable, unless it has been in some way negligent in respect to the danger of such an accident. Balt. City Pass. R. Co. v. Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; Buckbee v. Third Ave. R. Co., 64 App. Div. (N. Y.) 360, 72 N. Y. Supp. 217. In the case cited, it was held that an electric

shock received by a passenger on a trolley car is a direct physical and personal assault, for the consequence of which the company, if negligent, may be held liable.

44. Ohio & M. R. Co. v. Stansberry, 132 Ind. 533, 32 N. E. 218, 56 Am. & Eng. R. Cas. 285.

45. Washington v. Spokane St. R. Co., 13 Wash. 9, 42 Pac. 628. And see Garoni v. Campagnie, etc., Co., 39 St. Rep. (N. Y.) 63, 14 N. Y. Supp. 797; Boehncke v. Brooklyn City R. Co., 3 Misc. Rep. (N. Y.) 49, 51 St. Rep. (N. Y.) 434, 22 N. Y. Supp. 712.

46. Leonard v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985; Smith v. Met. St. Ry. Co., 59 App. Div. (N. Y.) 60, 69 N. Y. Supp. 176. In the case last cited the injury was caused by a break in the cable where it

by a passenger in consequence of the breaking of an axle by reason of a latent defect not discoverable by the most vigilant external examination, if it could have been discovered in process of manufacturing by the application of any test known to men skilled in such business.<sup>47</sup> But where

was spliced. Defendant proved that the cable was the best in use and that a system of constant inspection was maintained, but that the defect was not discovered in time to avoid the accident. The inspectors, however, on duty on the day of the accident were not called, and it was shown that the splice had been made eight days before, thoroughly and carefully, and that it ought to last five or six weeks; but it was held insufficient to overcome the presumption of negligence arising from the accident. And see *Libby v. Me. C. R. Co.*, 85 Me. 34, 20 L. R. A. 812, 58 Am. & Eng. R. Cas. 81, 26 Atl. 943; *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583, 30 N. E. 752, 44 St. Rep. (N. Y.) 680. In 1890, the New York Court of Appeals said: "The view which a carrier of passengers may have of what is or is not essential by way of inspection of its road and appliances, is not necessarily conclusive, although entitled to consideration, upon the inquiry as to whether the system is adequate to the demand of duty upon the vigilance of the company. The same degree of care and watchfulness are not alike requisite to all of the various portions of the machinery and appliances. The apparent necessity for frequency of examination, is somewhat dependent upon the liability to impair-

ment and the consequences which may be apprehended as the result of defective condition. But whether the system and the manner of its execution, are all that may be required of the carrier cannot be measured by any rule of law to be applied by the court. It must in view of the circumstances appearing by the evidence, be one of fact for the jury to determine upon proper instructions relating to the degree of care imposed upon the company; and while it is true that the question of fact so presented is somewhat speculative in the sense that it is not measured by any definite rule, it must nevertheless become a matter of judgment to be expressed by the jury and founded upon the evidence." *Palmer v. D. & H. C. Co.*, 120 N. Y. 170, 176, 24 N. E. 302, 30 St. Rep. (N. Y.) 817. And see *Poulsen v. Nassau El. R. Co.*, 30 App. Div. (N. Y.) 246; 51 N. Y. Supp. 933.

47. *Hegemen v. Western R. Corp.*, 13 N. Y. 9. But see *Texas & P. R. Co. v. Buckalew* (Tex. Civ. App.), 34 S. W. 165. So, where a pane of glass in the door of a car was cracked by a drunken man in an attempt to open it, and thereafter the plaintiff entering the car was injured by a piece of the glass falling upon him, it was held that the driver (there being no conductor) should have examined the door and ascertained the ex-

it is claimed that the accident was occasioned by the breaking of a brake-chain on a horse car, and it was proved for the defendant by one witness, who had for many years been a chain manufacturer, that in the case of a wrought-iron link, such as composed the chain, it was not possible for the external appearance of the iron to be without flaw and yet a flaw exist in the center; at least, that he never saw it in wrought iron and had been in the business for thirty-eight years; and it also appeared that one of the links of this wrought-iron chain did, in fact, break and was lost and the chain was comparatively a new one; it was for the jury to say whether or not a more minute inspection than was given would have revealed the defect in time to avoid the accident.<sup>48</sup> In an action against the carrier, by a passenger, to recover damages for personal injuries sustained while seated in the car, testimony describing the car's construction and furnishing is admissible in evidence as part of the *res gestæ*, tending to illustrate the manner of the fall and injury.<sup>49</sup>

**§ 6. Rules adopted by the company.**—A carrier has a right to make such reasonable rules and regulations as will tend to the better protection of its patrons and to the greater convenience of itself, and when made, a passenger must observe them.<sup>50</sup> But passengers are not presumed to know the rules

tent of its injuries, since he was aware of the break and should have either warned the plaintiff of its condition or refused to receive him in the car. *Allen v. D. D., etc., Ry. Co.*, 2 N. Y. Supp. 738, 19 St. Rep. (N. Y.) 114. It is responsible for defects in its cars which could have been discovered by the exercise of the utmost caution, care, and skill in their construction.

So held in *Siemens v. Oakland S. L. & H. El. Ry. Co.* (Cal.), 66 Pac. 672.

48. *Wynn v. Central Park, N. & E. River R. Co.*, 133 N. Y. 575, 44 St. Rep. (N. Y.) 673, 30 N. E. 721.

49. *Southern Ry. Co. v. Crowder* (Ala.), 30 So. 592.

50. *Boster v. Chesapeake & Ohio R. Co.*, 36 W. Va. 318, 52 Am. &

and regulations which are made for the guidance of conductors and other employees.<sup>51</sup> If the passenger refuse to comply with its reasonable regulations, as to fares or otherwise, the company may refuse to carry him.<sup>52</sup> A regulation of a carrier whose charter provides for passage over two lines for one fare, that upon the second line the passenger must have a transfer check and comply with its conditions, is not unreasonable.<sup>53</sup> So, a regulation upon a crowded suburban train by which the conductor and a collector start from each end of the train to collect tickets and fares and passengers are prohibited from passing through without a ticket, unless they satisfy the conductor or collector that they have already paid, may be enforced against a passenger having no previous notice thereof.<sup>54</sup> A rule of a horse railway company that its driver shall not allow an intoxicated person on the front platform under any circumstances, and a notice or placard posted in the car forbidding all persons to be on the

Eng. R. Cas. 357, 15 S. E. 158; Poole v. Northern Pacific R. Co., 16 Oreg. 261; Brown v. Kansas City F. T. S. & G. R. Co., 38 Kan. 634; Penn. R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651; Houston & T. C. R. Co. v. Clemons, 55 Tex. 88, 48 Am. Rep. 799.

51. N. Y., L. E. & W. R. Co. v. Winter, 143 U. S. 60, 36 L. Ed. 71, 11 Ry. & Corp. L. J. 146, 12 Sup. Ct. Rep. 356; Lesser v. St. Louis & S. Ry. Co., 85 Mo. App. 326. In the case last cited it was held that a refusal to charge the jury that the carrier had the right to make reasonable and necessary rules in the conduct of its business is erroneous.

52. Muldowney v. Pittsb. & B. Tract. Co., 8 Pa. Super. Ct. 335,

29 Pittsb. L. J. (N. S.) 158, 43 W. N. C. 52. A tender of five dollars in payment of a five-cent fare is unreasonable; and if a passenger refuses to tender a proper amount, in compliance with the rule of the company, she may be ejected. Id.; Barker v. Central Park, N. & E. River R. Co., 151 N. Y. 237, 35 L. R. A. 489, 45 N. E. 550; Fulton v. Grand Trunk R. Co., 17 U. C. Q. B. 428.

53. Percy v. Met. St. R. Co., 58 Mo. App. 75.

54. Faber v. Chic. G. W. R. Co., 62 Minn. 433, 64 N. W. 918. And see Florida S. R. Co. v. Hirst, 30 Fla. 1, 16 L. R. A. 631, 12 Ry. & Corp. L. J. 218, 11 So. 506, 52 Am. & Eng. R. Cas. 409.

front platform, and stating that the company will not be responsible for their safety there, are reasonable.<sup>55</sup> A street railroad company may establish a regulation requiring passengers to pay for packages of such size as to incommodate others.<sup>56</sup> But it is unreasonable to require a passenger in a street car who has inadvertently placed in the box for the reception of fares more than the required fare to go to the office of the company for reimbursement.<sup>57</sup> So a rule of a street railroad company that where its cars stop beyond the crossing they should not be backed to receive a person who has properly signaled, may be unreasonable.<sup>58</sup> Whether any particular rule is lawful and reasonable is always a question of law for the court;<sup>59</sup> and if it be reasonable, the passenger is bound to submit to it, and the conductor must enforce it, and the physical condition of the passenger, as where he claimed to be affected by nausea, which might be aggravated by going inside the car in compliance with the regulation of the carrier, and insisted, therefore, in riding on the car platform, is no reason why the conductor should not eject him for refusing to go inside.<sup>60</sup> If the passenger intentionally

55. O'Neill v. Lynn & B. R. Co., 155 Mass. 371, 29 N. E. 630.

56. Morris v. Atlantic Ave. R. Co., 116 N. Y. 552, 27 St. Rep. (N. Y.) 667. The case also held that the conductor was not the sole judge as to whether a particular package came within the regulation, but that it was a question for the jury.

57. Corbett v. Twenty-third St. R. Co., 42 Hun (N. Y.), 587.

58. So held where the passenger on a rainy night with a muddy road had signaled the car, but it went forty feet beyond the cross-

ing before it stopped, and the passenger would have had seven blocks to walk unless he took passage. Jackson Ry., L. & P. Co. v. Lowry, 23 Am. & Eng. R. Cas. (N. S.) 103, 30 So. 634.

59. Dowd v. Albany Ry., 47 App. Div. (N. Y.) 202, 62 N. Y. Supp. 179; Avery v. N. Y. C., etc., Co., 121 N. Y. 31, 30 St. Rep. (N. Y.) 471, 24 N. E. 20; Muckle v. Rochester Ry. Co., 79 Hun (N. Y.), 32, 61 St. Rep. (N. Y.) 193, 29 N. Y. Supp. 732.

60. Montgomery v. Buffalo Ry. Co., 165 N. Y. 139, 58 N. E. 770.

violated the rule he cannot recover if he be ejected therefor or injured thereby, no matter what his excuse may be;<sup>61</sup> unless the carrier has permitted the rule to be generally and notoriously disregarded.<sup>62</sup> It is not necessary to plead the rule in order to give evidence of its violation,<sup>63</sup> nor is it necessary that the carrier should bring home to each passenger a personal knowledge of the rule it is seeking to enforce.<sup>64</sup> Whether unnecessary violence was used in enforcing the regulation is always a question of fact for the jury.<sup>65</sup>

**§ 7. Rates of fare.**— The general rule is that the State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce;<sup>66</sup> and the legislative rate is, at least, presumptively reasonable.<sup>67</sup> Sometimes the State permits the municipality by ordinance to regulate, reasonably, the rates of fare of street surface railroad companies within its limits. In determining whether or not such an

61. Sweetland v. Lynn & B. R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783; Calderwood v. N. Birmingham St. R. Co. (Ala.), 11 So. 66.

62. Chicago, M. & St. P. R. Co. v. Lowell, 151 U. S. 209, 38 L. Ed. 131, 14 Sup. Ct. Rep. 281.

63. Railroad Co. v. Ward, 135 Ill. 511, 26 N. E. 520; Gulf C. & S. F. Ry. Co. v. Bell (Tex. Civ. App.), 58 S. W. 614.

64. Barker v. C. P., N. & E. River R. Co., 151 N. Y. 237, 45 N. E. 550, 3 Am. Cas. 313; Vedder v. Fellows, 20 N. Y. 126.

65. Vedder v. Fellows, 20 N. Y. 126.

66. Stone v. Farmers' Loan & Trust Co., 116 U. S. 325, 29 L. Ed. 636; Georgia R. & Banking Co. v. Smith, 128 U. S. 174, 32 L. Ed. 377; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Super. Ct. 418 (modified rehearing 171 U. S. 361, 18 Sup. Ct. Rep. 888, 43 L. Ed. 197).

67. Beardsley v. N. Y., L. E. & W. R. Co., 15 App. Div. (N. Y.) 251, 257; Ruggles v. Illinois, 108 U. S. 541, 27 L. Ed. 812; Budd v. N. Y., 143 U. S. 517, 545, 36 L. Ed. 247.

ordinance is reasonable, resort to the earnings of the road for the years during which conditions prevailed upon which the ordinance is based must be had, although they were exceptionally small. Future possibilities cannot have weight.<sup>68</sup> When the grant of franchise by a municipal corporation to a street railroad company fixes the rate of fare to be charged, a reserved right of regulation in an ordinance does not authorize a modification or change of the rate during the life of the grant where the statute confers power to fix the rates but no power to thereafter change them.<sup>69</sup> The provision

68. Milwaukee El. R. & L. Co. v. Milwaukee (C. C. E. D. Wis.), 87 Fed. 577. It was also held that rates would not be deemed excessive demands on the public if lower ones would be confiscatory, where the company had acquired the old independent lines, extended its tracks, and furnished transfers without increasing the fare, so that under the new system one fare would carry a passenger as far as two or three would under the old, while the rates were the same as those generally prevailing in other cities of similar size; that whether or not the earnings were sufficient to justify a reduction of fares depended upon the showing of the earning capacity at existing rates, the amount really and necessarily invested in the enterprise, and whether the ratio of return upon the investment was excessive; that an arbitrary reduction of fares was not justified if the railroad bonds are at five per cent. interest and its earnings, adopting a conservative estimate of the value of its property and the largest estimate of its earnings, are only five and

two-tenths per cent. *Coy v. Detroit, Y. & A. A. Ry. Co. (Mich.)*, 85 N. W. 6, 7 Det. Leg. N. 653; *Kissane v. Detroit, Y. & A. A. Ry. Co. (Mich.)*, 79 N. W. 1104, 6 Det. Leg. N. 418.

69. *Cleveland City R. Co. v. Cleveland (C. C. N. D. Ohio)*, 94 Fed. 385. Also held that the reservation of the right to change the rates of fare would not be effective after extension of the road and consolidation with other roads under new ordinances by which rates of fare over the extended lines were fixed; but that the municipality was not prohibited from modifying such a contract, upon sufficient consideration, by a statute prohibiting it during the term of the grant to release the grantee from any obligation or liability imposed by the terms of the grant. Id.

The question recently was before the United States Supreme Court upon an ordinance of the city of Detroit, under statute authorizing it, among other things, to agree with street railroad companies upon rates of fare, which

of the New York Railroad Law that in cities having a population of 800,000 or more, street surface railroad corporations may make an intertraffic contract to carry a passenger for a continuous trip and for a single fare not exceeding five

should not be increased without the consent of such authorities. Upon the organization of a street railroad corporation to exist for thirty years, the ordinance permitting the operation of the street railroad within the streets, provided that the rate of fare for any distance should not exceed five cents in any one car or on any one route named in the ordinance, except where cars or carriages shall be chartered for specific purposes, etc. Subsequent ordinances, seventeen years later, provided for extensions over various other streets, and also for a special tax on gross receipts, and also that the subsequent ordinance should take effect upon the filing of a written acceptance; and that thereby the time limited for the existence of the corporation should continue for thirty years from that date. There were various reservations in the ordinance. In 1899, and within the thirty years of extended time, an ordinance was passed reducing the rates of fare, and the court said: "Narrowly considered, an act to provide for the formation of street railway companies should contain nothing but provisions relating to their formation and organization, but it would be absurd to hold that the constitutional provision" (corporations may be formed under general laws, but shall not be created by special act except for municipal purposes)

"would prevent the introduction into such an act of various details in regard to the corporation after their formation, and in regard to their government, operation, regulation and other matters which might be fairly considered as germane to the particular object named in the title of the statute, and hence, we think it would be a most narrow construction of the constitutional provision to hold that under such a title it was incompetent for the legislature to provide that the benefits and obligations conferred and provided for in the act should be made applicable to corporations of a like character already organized and in operation. It is germane and appropriate to the subject-matter of the act, to enact under such a title, that all companies of the like nature should have the same privileges, is fairly within the general object described in the title. This being true, the companies organized under the tram railway act were equally, with those organized under the street railway act, enabled by the express authority of the legislature to enter into a contract for a rate of fare with the city, and when in 1879 and the subsequent years, those companies which were organized under the tram railway act entered into further agreements with the city in the way of ordinances, those agreements were valid so far

cents, nor exceeding the lawful fare, do not apply to such a contract made in 1895, in a city not shown to have then had such a population, by a corporation operating a railroad prior to April, 1899, a large part of which in 1895 was not

as the objections heretofore considered are concerned, and not subject, in regard to this matter, to alteration at the will of one party only. \* \* \*

"An examination of them" (the ordinances) "leads us to the conclusion that not one provided or was intended to provide for a power to alter an agreement in relation to the rates of fare entered into between the parties. The right from time to time to make such further rules, orders, or regulations as to the common council may seem proper, cannot be held to extend to the alteration of a contract as to the rate of fare which shall be charged for the transportation of passengers. We think, as was stated by the court below that this reservation permitted the city to make further rules or regulations than those contained in the ordinances, in regard to all matters incident to the construction and operation of the road, such as the location of the tracks in the streets, the placing of switches and turntables, the repair of the pavement between the tracks, the removal or limitation of the number of tracks, in the interest of public travel, the frequency with which cars should be run for the public convenience, the stopping of cars at street crossings, the use of fenders, the rate of speed to be maintained, the sale of tickets, and generally to details of the conduct

and operation of the railway, which experience might show to be necessary, in addition to or in amendment of those specified in the consent for the protection of life, the accommodation of the public, and the avoidance of injury to private property. Such regulations are not invasions of the contract rights of the company, and are just and reasonable. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 305, 43 L. Ed. 702, 709, 19 Sup. Ct. Rep. 465.

"The fixing of rates is, as we have already said, among the most vital portions of the agreement between the parties contained in the ordinances. It cannot be supposed for one moment, with regard to a right so fundamental in its nature, that there was any intention to permit the common council in its discretion to thereafter make an alteration which might be fatal to the pecuniary success of the company. For the reasons already given, we think the language used does not, in fact, give any such power to the common council. The ordinances of 1899 are, so far as this record shows, the first wherein the common council has assumed to make any change in the rates of fare without the assent of the company to be affected thereby. From 1862 until 1899 there seems to have been no attempt to exercise this alleged power of alteration by the

in the city, and being the successor of a railroad which had been operated for twenty years; such a railroad or its lessee may charge for a continuous trip a fare exceeding five cents.<sup>70</sup> A street surface railroad company is bound by a

common council without the consent of the railway company. While the rate of fare existed as agreed upon between the city and the railway company, expenditures involving millions of dollars were entered upon, changing the mode of transportation from animal to electric power, and no claim seems ever to have been made on the part of the city of a right of alteration to be exercised in accordance only with its own views of reason and propriety. This in itself is a strong implication of the want of any such power under the various reservations set forth in the foregoing statement of facts and contained in the ordinances specified. But, aside from that and considering only the nature of the right itself growing out of the agreement as to fares, we are of the opinion that not one of the reservations of the right to make further rules or regulations could by any fair construction be held to include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in those ordinances."

In the same case, the court also held that the corporation could take an extended term, as provided for in the ordinance, and it formed a good consideration for the agreement on the part of the company to perform the other obligations contained in the ordinance, although the life of the corporation

was limited to a time far short of the extended term. *Detroit v. Detroit Citizens' St. R. Co.*, decided March 3, 1902.

70. *Brooklyn Elev. R. Co. v. B. & W. E. R. Co.*, 23 App. Div. (N. Y.) 29, 48 N. Y. Supp. 665. It was also held that an agreement entered into between street railroad companies having connecting lines that one of them should make no discrimination in the rate of fare over its road in favor of any other railroad and against the other party to the contract, there being no requirement that the rate of fare in the absence of any discrimination should not be as low as the former company might choose to make it, is not a violation of public policy.

Section 39, article II, New York Railroad Law, giving a right of action and the penalty for charging and receiving more than the lawful rate of fare, does not apply to a case where the conductor of a car to which the passenger has been transferred attempts to collect the same fare in ignorance of the passenger's right to continue his ride. *Stewart v. Met. St. R. Co.*, 20 Misc. Rep. (N. Y.) 605, 46 N. Y. Supp. 414. A person having no intention to make a thorough trip, demanding a transfer over a connecting line merely in order to have the demand refused and to bring an action to recover the statutory penalty for the refusal, cannot be

representation made by one of its conductors to a passenger that its car will carry him between two points for a fare named.<sup>71</sup> The provisions of the New York Street Surface Railroad Act of 1884, chap. 252, to the effect that no company or corporation incorporated under or constructing and operating a railroad under the act shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road or line or branch operated by it, or under its control, to any other point thereon, or on any connecting branch thereof within the limits of any incorporated city or village, do not apply to routes or roads leased from steam railroad companies.<sup>72</sup> A common carrier has the right to issue and sell special tickets at a reduced rate of fare in consideration of the purchaser's agreement to certain conditions and limitations contained therein, among the which is that the ticket shall not be transferred; and the use of such a ticket by another to whom it has been transferred in violation of the contract is an actionable wrong.<sup>73</sup>

**§ 8. Transfers.**— In cases where by law or by the contract the carrier is bound to furnish a transfer to his passenger over a connecting line, it must see to it that the correct transfer is furnished, and the passenger is not necessarily negligent if he fail to discover any error therein. Street railroad companies are permitted to make and enforce all reasonable rules with respect to the use of transfers that may be necessary to protect them against imposition and are consistent with

considered a passenger, and his action for the penalty cannot be maintained. *Myers v. Brooklyn Heights R. Co.*, 10 App. Div. (N. Y.) 335, 41 N. Y. Supp. 798, 75 St. Rep. (N. Y.) 1197.

*71. Wright v. Glens Falls, etc.,*

*St. R. Co.*, 24 App. Div. (N. Y.) 617, 48 N. Y. Supp. 1026.

*72. McNulty v. Brooklyn Heights R. Co.*, 36 Misc. Rep. (N. Y.) 402.

*73. D., L. & W. Ry. Co. v. Frank (U. S. C. C. N. Y.), 110 Fed. 689.*

the rights of the public. A railroad limiting the use of the transfer to the next car is proper if there be room on such car for the passenger to ride with reasonable comfort and safety. A rule with respect to the punching of transfers is reasonable if due precaution be taken to insure its observance and application in such a manner as to protect a passenger who had received the transfer from the conductor of the other car only a few minutes before and had taken the first car on which the transfer, if properly punched, would have entitled him to ride. If the passenger, by reason of the company's inattention to its own rules regarding transfers or to statutory requirement in that regard, is ejected, he is not confined to an action for a breach of the contract for transportation; if he were, the carrier might be encouraged to employ negligent or incompetent conductors, to the serious annoyance and inconvenience of the traveling public; but he is entitled to maintain an action for the wrongful ejection, and to recover the compensatory damages, including the indignity, the humiliation, and injury to his feelings caused by the remarks of the conductor while ejecting him, as well as by the ejection itself. Exemplary damages, however, will not be awarded unless it appear that the defendant had been guilty of negligence in employing or retaining the offending conductor, or he had shown incompetence or previous misconduct.<sup>74</sup> If the transfer which should have been

74. *Eddy v. Syracuse R. T. Co.*, 50 App. Div. (N. Y.) 109, 112, 63 N. Y. Supp. 645; *Hayter v. Brunswick Tract. Co.* (N. J. Sup.), 49 Atl. 714; *Carr v. Toledo Tract. Co.*, 19 Ohio C. C. 281, 10 O. C. D. 296; *Cleveland, C., C. & St. L. Ry. Co. v. Quillen*, 22 Ind. App. 496; *Vining v. Detroit, Y. & A. A. Ry. Co.* (Mich.), 80 N. W. 1080; *Rouser v. North Park St. R. Co.*, 97 Mich. 565, 56 N. W. 937; *Muckle v. Rochester R. Co.*, 79 Hun (N. Y.), 32, 61 St. Rep. (N. Y.) 193, 29 N. Y. Supp. 732; *Laird v. Pittsb. Tract. Co.*, 166 Pa. St. 4, 31 Atl. 51, 36 W. N. C. 24, 2 Det. Leg. N. 339, 25 Pittsb. L. J. (N. S.) 291; *Vicksburg R. P.*

given to the passenger would not have entitled him to ride upon the car he took, he cannot recover for the ejection, since the transfer would be conclusive evidence of his rights.<sup>75</sup>

& M. Co. v. Marlett (Miss.), 29 So. 62; Ray v. Cortland & H. Tract. Co., 19 App. Div. (N. Y.) 530, 46 N. Y. Supp. 521; Kiley v. Chicago City Ry. Co., 90 Ill. App. 275. It would seem, however, that upon appeal in the case last cited it was held that the plaintiff could not recover for any injuries sustained where reasonable force had been used to eject her, it being her duty to peaceably leave the car and seek redress in the courts, 189 Ill. 384, 59 N. E. 794; O'Rourke v. Citizens' St. Ry. Co., 103 Tenn. 124, 46 L. R. A. 614, 52 S. W. 872. Also held that the passenger is not bound by the conditions printed on the back of a transfer ticket, though there is printed on the face thereof a recital that "the passenger in accepting this transfer agrees to read and be governed by the conditions on the back hereof subject to the rules of the company," unless the conditions so imposed are reasonable; and that a condition providing that a part of the conditions on which it is given and accepted are that passengers shall examine the time and directions and see that the same are correct, is not reasonable and will not be enforced when the system of figures and punches used to indicate time of transfer are so complicated as to be not easily understood by persons of ordinary intelligence; also that the condition providing that "in accepting this transfer passenger agrees that in

case of controversy with conductor about this ticket and its refusal, to pay the regular fare charged, and apply at the office of the company for a refund of the same within three days," is unreasonable. *Id.* And see *Davis v. Railroad Co.*, 107 Ga. 420; *McMahon v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. (15 J. & S.) 282; *Heffron v. Detroit City R. Co.*, 92 Mich. 406, 31 Am. St. Rep. 601, 52 Am. & Eng. R. Cas. 588, 52 N. W. 802, 16 L. R. A. 345. Where the defense in an action for damages for ejection from a street car was that the plaintiff's transfer ticket had expired, evidence of statements made at the time of the ejection by some unknown person, not a party, that he had seen plaintiff leave the other car and take the one he was on, is inadmissible as hearsay and not the best evidence. *Woods v. Buffalo R. Co.*, 35 App. Div. (N. Y.) 203, 54 N. Y. Supp. 735. A transfer ticket given by one street railroad company over another line operated by it entitled the passenger to passage upon the first car on the other line in which he can find a seat, irrespective of the provisions of section 104 of the New York Railroad Law. *Jenkins v. Brooklyn Heights R. Co.*, 30 App. Div. (N. Y.) 622, 51 N. Y. Supp. 868; *Hanna v. Nassau El. R. Co.*, 18 App. Div. (N. Y.) 137; 45 N. Y. Supp. 437.

75. *Keen v. Detroit El. R. Co. (Mich.)*, 81 N. W. 1084.

Neither can he recover if he fail to procure the necessary transfer and refuse to pay his fare on the last car.<sup>76</sup> But if the company have established by its practice a right in its passengers to change without a transfer ticket from one car into another in the completion of their journey, such prac-

76. Graves v. Newark & B. St. Ry. Co., 6 N. J. L. J. 307; Anderson v. Union Tract. Co., 7 Pa. Dist. Ct. 41; Wakefield v. South Boston R. Co., 117 Mass. 544. Where there is no community of enterprise between two connecting railroad companies, one of them is not liable for ejecting a person who presents a transfer ticket from the other which was not acceptable under the reasonable rules of the company, where a mistake was made in issuing the same by an employee of the connecting road. Jacobs v. Third Ave. R. Co., 34 Misc. Rep. (N. Y.) 512, 69 N. Y. Supp. 981, revg. 33 Misc. Rep. (N. Y.) 802. The case cited was itself reversed and the one in 33 Misc. Rep. (N. Y.) affirmed. See N. Y. L. J. of April 28, 1902, Vol. 27, No. 24. The headnote is as follows:

"A street railroad company issuing transfer tickets to passengers under a mutual traffic arrangement with a connecting railroad company acts as the agent of such connecting company, and the latter is liable if it ejects a passenger who presents a transfer ticket incorrectly punched by an employee of the first railroad company.

"There can be no such thing as a reasonable regulation by a railroad company which protects it against the mistakes of its own agents, which result in the invasion of an innocent passenger's rights.

"The good faith of a conductor in ejecting a passenger presenting a transfer ticket, incorrectly punched, affords no protection to the railroad company in whose employment he acts."

And the court said: "The learned Appellate Term reversed the judgment upon the grounds that the business transacted by the respective railroads was wholly independent the one of the other, and that nothing was shown to establish a common interest in the fares received, which was essential to the imposition of the liability sought to be established in this action. This view entirely ignored the provisions of the traffic agreement, wherein each railroad for a valuable consideration agreed to transport the passengers of the other. Under such circumstances the obligation imposed upon each was to transport passengers delivered by the other, holding transfer tickets, in the same manner and subject to the same liability as though the passenger paid a cash fare therefor to the railroad guilty of the breach of contract of carriage. While the rule was recognized by the learned Appellate Term that the authorities support a cause of action in tort, where a mistake is made by a servant of the company guilty of an invasion of an innocent passenger's rights, yet it was held that such rule did

tice cannot be changed without due notice.<sup>77</sup> If the transfer ticket designates the route by which the carriage of the passenger may be continued so generally as to be applicable to several lines, he has the right to be transported over either.<sup>78</sup> The right of the street car passenger, under New York

not apply to the circumstances of this case for the reason that the one committing the mistake was not the agent nor servant of the company, and that such company was justified in making and enforcing reasonable rules and regulations respecting the recognition of transfer tickets. The first position necessarily falls under the observations already made and cannot be supported. There can be no such thing as a reasonable rule and regulation which protects the company against the mistakes of its own agents which result in the invasion of a passenger's rights, otherwise all that would be necessary for a railroad corporation to do would be to regulate a given subject and then shield itself behind such regulation when called to account for an infringement of the legal rights of its passengers.

"It is contended, however, by the respondents that the conductor in what he did acted in good faith, was guilty of no malice, and sought to protect the property of the company, which by reasonable regulation he was called upon to do in the performance of his duty. The good faith of the conductor is of no consequence. It could not authorize or protect against unlawful acts. *Yates v. N. Y. C. & H. R. R.*, 67 N. Y. 100; *Jenkins v. B'klyn*

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29 App. Div. 8. Further reliance is placed by counsel upon the case of *Townsend v. N. Y. C. & H. R. R.*, 56 N. Y. 296. This case must be limited to its facts and is not authoritative beyond it. There a passenger was possessed of no ticket, and sought to ride upon his statement that he had paid his fare and that his ticket had been taken up before he changed cars, and he was held negligent in not procuring the delivery of his ticket by the other conductor. This case has been several times distinguished (*English v. Del. & H. C. Co.*, 66 N. Y. 454) and does not seem even to have been followed upon the subsequent trial of that action. 6 T. & C., 495; *Ray v. Cortlandt & Homer Traction Co.*, 19 App. Div. 53. The present case is distinguishable, for here there was no negligence of the passenger. He presented a ticket for which he had paid and which entitled him to passage under his contract of carriage."

77. *Consolid. Tract. Co. v. Taborn*, 58 N. J. L. (29 Vroom), 1 408, 32 Atl. 685, 2 Am. & Eng. R. Cas. (N. S.) 124.

78. *Pine v. St. Paul City R. Co.* (Minn.), 52 Am. & Eng. R. Cas. 584, 52 N. W. 392, 16 L. R. A. 347.

Railroad Law, § 104, to one continuous trip for a single fare, and upon demand to have a transfer entitling him to such continuous trip delivered without extra charge, cannot be incumbered by an arbitrary condition that he shall take a car within ten minutes after receiving his transfer, regardless of whether the cars passing within that time afford opportunity or convenience for passengers.<sup>79</sup> The city of Atlanta, Georgia, has no power to compel the Atlanta Consolidated Transfer Company to issue transfers.<sup>80</sup>

**§ 9. Contract limiting liability.**— The duty of a carrier of passengers to use extraordinary diligence to protect the lives and persons of his passengers cannot be waived even by express contract.<sup>81</sup>

79. Jenkins v. Brooklyn Heights R. Co., 29 App. Div. (N. Y.) 8, 51 N. Y. Supp. 216, 5 Am. Cas. 315.

80. Atlanta v. Old Colony Trust Co. (C. C. App. 5th C.), 59 U. S. App. 230, 88 Fed. 859.

81. Central of Georgia Ry. Co. v. Lippman, 110 Ga. 665; Randall v. New Orleans & N. E. R. Co., 45 La. Ann. 778, 13 So. 166; Terra Haute & I. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339; Louisville, N. A. & C. P. Co. v. Taylor, 126 Ind. 126, 25 N. E. 869, 25 Ohio L. J. 55; Fort Worth & D. C. Ry. Co. v. Rogers, 21 Tex. Civ. App. 605, 53 S. W. 366; Williams v. Railroad Co., 18 Utah, 210; Louisville & N. R. Co. v. Bell, 100 Ky. 203. But see Bissell v. N. Y. C. R. Co., 25 N. Y. 442; Blair v. Erie Ry. Co., 66 id. 313. In the case last cited, after quoting certain authorities, the court said: "It will thus be seen, that in each of the cases

cited there was an express provision which evidently guarded against every kind 'of personal injury from whatsoever cause,' which might, perhaps, include such as might arise from negligence. While here no language is employed which can be fairly interpreted as aimed against negligence, it would, I think, be extending the purpose and scope of the contract in this case far beyond its legitimate object, to hold that it was designed to protect the defendant against its own negligent acts. The English cases which are cited and which have been examined, did not establish the proposition contended for, and no case has been referred to where it is held that any language, except such as was entirely clear and unmistakable in its terms, will exempt a railroad company from liability for negligence. It may also be observed that there is quite a distinc-

**§ 10. When relation of carrier and passenger commences.—**

A person who has signaled a street car and it has stopped for him has been held to become a passenger at once.<sup>82</sup> Certainly, where a street car stops at a usual place for passengers and a person, in the exercise of due care, gets on the steps or platform, or places one foot on the step of the car for the purpose of taking passage while it is so waiting, he is to be regarded as a passenger.<sup>83</sup> Where two street railway companies contract to give transfers and carry the passengers of each other over their respective roads, a person paying his fare and receiving a transfer from one road is a passenger on the other.<sup>84</sup> But one does not become a passenger by attempting to board a moving electric street car after it has passed the proper and usual stopping place, so as to entitle him to the high degree of care due from the

tion between cases where damages for injuries are expressly provided against or where the traveler agrees to be carried at his own risk, and those where the contract states, generally, that the carrier assumes no liability."

82. Carney v. Cincinnati St. Ry. Co., 8 Ohio S. & C. P. Dec. 587; West Chicago St. R. Co. v. Shippelt, 85 Ill. App. 683. But see Donovan v. Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; Schaefer v. St. Louis S. R. Co., 128 Mo. 64, 30 S. W. 331.

83. Gaffney v. St. Paul City Ry. Co., 81 Minn. 459, 84 N. W. 304; Citizens' St. Ry. Co. v. Merl (Ind. App.), 59 N. E. 491; Barth v. Kansas City Elev. R. Co., 142 Mo. 535, 10 Am. & Eng. R. Cas. (N. S.) 281, 44 S. W. 778; Drew v. Sixth Ave. R. Co., 26 N. Y. 49, 1 Abb. Ct. App. Dec. 556; Ganiard

v. Rochester City & B. R. Co., 50 Hun (N. Y.), 22, 18 St. Rep. (N. Y.) 692; affd., 121 N. Y. 661; Wallace v. Third Ave. R. Co., 36 App. Div. (N. Y.) 57, 55 N. Y. Supp. 132; Gordon v. W. E. St. Ry. Co., 175 Mass. 181, 55 N. E. 990; Smith v. St. Paul City Ry. Co., 32 Minn. 1, 16 Am. & Eng. R. Cas. 310; McDonough v. Met. R. Co., 137 Mass. 210.

84. Jacobs v. Third Ave. R. Co., 69 N. Y. Supp. 981. So held where a woman with a transfer ticket approaching a street car to get on was struck by a piece of the trolley-pole which broke while the motorman was trying to change it to the other end of the car. Keator v. Scranton Tract. Co., 191 Pa. St. 102, 43 Atl. 86, 6 Am. Neg. Rep. 187, 44 L. R. A. 546; Fay v. Met. St. R. Co., 62 App. Div. (N. Y.) 51, 70 N. Y. Supp. 763.

carrier; to make him such there must have been some act on the part of those in charge of the car indicating acceptance, such as an act indicating an intention to stop for him. The relation can only be created by contract, express or implied.<sup>85</sup> If the carrier accept a fare from a person riding on the front platform of a crowded car, he thereby becomes a passenger and cannot be ejected for a violation of the rule of the company against riding on the front platform, certainly without returning his ticket or fare.<sup>86</sup> If as he step upon the platform of a car he announce his intention not to pay, but is allowed to enter and sit down like the other passengers and the fare is afterward demanded of him in the usual manner, he is entitled to be treated as a passenger.<sup>87</sup> So, if the company undertake to transport him gratuitously.<sup>88</sup> Whether the plaintiff was on the car as a passenger is a question of fact for the jury if the evidence be conflicting.<sup>89</sup>

85. Schepers v. Union Depot R. Co., 5 Am. Electl. Cas. 398, 126 Mo. 665, 29 S. W. 712, 2 Am. & Eng. R. Cas. (N. S.) 9; Farley v. Cincinnati, H. & D. R. Co. (U. S. C. C. A., Ohio), 108 Fed. 14; Ill. Central R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294.

86. Hanna v. Nassau El. R. Co., 18 App. Div. (N. Y.) 137, 45 N. Y. Supp. 437.

87. Sanford v. Eighth Ave. R. Co., 23 N. Y. 343.

88. Perkins v. N. Y. C. R. Co., 24 N. Y. 196; Rosenberg v. Third Ave. R. Co., 47 App. Div. (N. Y.) 323, 61 N. Y. Supp. 1052; Buck v. People's St. R., etc., Co., 108 Mo. 179, 52 Am. & Eng. R. Cas. 512, 18 S. W. 1090; North Chicago St. R. Co. v. Williams, 140 Ill. 275, 52 Am. & Eng. R. Cas. 522, 29 N. E. 672.

89. Meyer v. Second Ave. R. Co., 21 N. Y. Super. Ct. (8 Bosw.) 305; Buffet v. Troy & Boston R. Co., 40 N. Y. 168; Gordon v. Grant St. & Newtown R. Co., 40 Barb. (N. Y.) 546. In an action against a street railroad company, where it was sought to recover for injuries to a boy, sustained by him while playing on cars left by the defendant in the street at the end of its line, an instruction "that plaintiff was not a passenger nor entitled to the rights of the passenger at the time of the injury," where the jury were not told what defendant's liability was to passengers, is not erroneous unless it tended to mislead the jury. George v. Los Angeles Ry. Co., 126 Cal. 357, 46 L. R. A. 829, 58 Pac. 819.

§ 11. Who are not passengers.—The master is liable only for the authorized acts of the servant — those done within the scope or line of the servant's employment. The root of the master's liability for the servant's act is the master's consent, express or implied, and when the servant's acts are done within the scope of his employment or for his master's benefit, or in furtherance of his interest, although not strictly in the line of his duty, yet in the course of his employment, the master's assent is implied, and he is accordingly held liable. But it is not within the scope of a motorman's employment to invite a boy to ride free, or to employ him to assist in the performance of his duties and compensate him by free transportation; and the boy does not become a passenger if he accept the invitation.<sup>90</sup> A newsboy who jumps on the street car without signaling it to stop, for the purpose of selling papers and jumping off again, is not a passenger although he intended to pay fare if the conductor asked him.<sup>91</sup> A carrier cannot refuse to accept a person as a pas-

90. *Finley v. Hudson El. Ry. Co.*, 64 Hun (N. Y.), 373, 46 St. Rep. (N. Y.) 202, 19 N. Y. Supp. 621; affd., 74 N. Y. 618; *Buckley v. N. Y. & H. R. Co.*, 43 N. Y. Super. Ct. (11 J. & S.) 187. Where the defendant hired a driver for one of its cars, put him in charge of it and of the team that drew it, committed to him the management of the same so far as the propulsion of the car was concerned, and it was necessary in the performance of that duty that he should drink, and he called a boy on to the car to give him water, and after he had drank told him to step off, and while he was in the act of stepping off, whipped up his

horses so that the boy fell and was injured, it was held that an action could be maintained for the injuries. *Day v. Brooklyn City R. Co.*, 12 Hun (N. Y.), 435; affd., 76 N. Y. 593.

91. *Raming v. Met. St. Ry. Co.*, 157 Mo. 477, 57 S. W. 268; *Pitcher v. People's St. R. Co.* (Pa. C. P.), 9 Lanc. L. Rev. 276; *Condran v. Chicago, Milwaukee & St. P. R. Co.* (C. C. App., 8th C.), 67 Fed. 522, 28 L. R. A. 749, 32 U. S. App. 182, 14 C. C. A. 506. One accepting a free pass on a street railroad, with a printed condition that the company shall not be liable under any circumstances, whether by negligence of agents or other-

senger merely because he is blind;<sup>92</sup> it may refuse to receive an intoxicated person. It has authority to refuse to receive as a passenger, or to expel one who so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of other passengers.<sup>93</sup>

**§ 12. When relation of carrier and passenger ceases.—** The relation to the carrier of a passenger alighting from a street car ceases upon his succeeding in getting a footing upon the street which he can maintain; but the carrier is liable for injuries to a passenger from being run over by a car upon a parallel track if guilty of negligence in respect to providing a safe place to alight, where such passenger fails to effect a landing upon the street and falls upon the parallel track as a result of his attempt to land and not as a sequence to a landing already accomplished.<sup>94</sup> The relation does not continue during the passage to the sidewalk after a safe footing upon the street is once obtained,<sup>95</sup> unless there

wise, for injuries, is bound by that condition. *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794.

92. *Zackery v. Mobile & O. R. Co.*, 74 Miss. 520, 36 L. R. A. 546, 6 Am. & Eng. R. Cas. (N. S.) 267, 21 So. 246; *Croon v. Chicago, M. & St. P. R. Co.*, 52 Minn. 296, 18 L. R. A. 602.

93. *Freedon v. N. Y. C. & H. R. R. Co.*, 24 App. Div. (N. Y.) 306, 48 N. Y. Supp. 584; *Pittsb., C. & St. L. R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68; *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.), 304, 87 Am. Dec. 714; *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108; *Meyer v. St. Louis*, etc.,

R. Co., 10 U. S. App. 677, 54 Fed. 116, 4 C. C. A. 221.

94. *Augusta R. Co. v. Glover*, 92 Ga. 132, 58 Am. & Eng. R. Cas. 269, 18 S. E. 406; *Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455; *Smith v. City & S. R. Co.*, 6 Am. Electl. Cas. 561, 29 Oreg. 539, 5 Am. & Eng. R. Cas. (N. S.) 163, 46 Pac. 136; *Brunswick & W. R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000; *Atlanta Consol. St. R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41; *South Covington & C. St. R. Co. v. Beatty* (Ky.), 50 S. W. 239, 20 Ky. L. Rep. 1845, 6 Am. Neg. Rep. 75.

95. *Creamer v. West End St. R. Co.*, 4 Am. Electl. Cas. 476, 156

be obstructions upon the carrier's right of way, such as rails left by it between the track and the sidewalk.<sup>96</sup> It then ceases when the obstructions are safely passed. The status of the passenger does not necessarily terminate upon the arrival of the car at his destination if he does not alight therefrom at that point.<sup>97</sup>

**§ 13. Duty of motorman, etc., in management of car.—** It has long been the settled law that where passengers are getting on or alighting from cars propelled by steam, that to suddenly start the car, thereby endangering the safety of the person, without giving warning, is an act of negligence.<sup>98</sup> And this rule has been applied to street cars propelled by horses.<sup>99</sup> Stronger reasons exist for applying this rule to cars propelled by electricity and to cable cars than to horse cars, as the motor is more sudden and powerful in its operation.<sup>1</sup> It may involve a serious jerk in starting, and a jury would be warranted in inferring want of ordinary care in its operation from the fact that a woman passenger was thrown to the floor and injured through the starting of the car before

Mass. 320, 16 L. R. A. 490, 52 Am. & Eng. R. Cas. 558, 31 N. E. 391. Having alighted and obtained a safe footing on the street, and then having stepped upon the other track he was killed, and in the case cited he was held not to be a passenger within the Massachusetts statute.

96. Wells v. Steinway, 18 App. Div. (N. Y.) 180, 45 N. Y. Supp. 864.

97. Rosenberg v. Third Ave. R. Co., 47 App. Div. (N. Y.) 323, 61 N. Y. Supp. 1052; Toledo Consol.

St. R. Co. v. Fuller, 9 O. C. D. 123, 17 Ohio C. C. 562.

98. Pfeffer v. Buffalo Ry. Co., 4 Am. Electl. Cas. 439, 444, 4 Misc. Rep. (N. Y.) 465; Keating v. N. Y. C. R. Co., 49 N. Y. 673.

99. Poulin v. Broadway R. Co., 61 N. Y. 621; Maher v. Central Park R. Co., 67 id. 55; Morrison v. Broadway R. Co., 130 id. 166; Akersloot v. Second Ave. R. Co., 131 id. 599, 30 N. E. 195, 43 St. Rep. (N. Y.) 290.

1. Pfeffer v. Buffalo Ry. Co., 4 Am. Electl. Cas. 444, 4 Misc. Rep. (N. Y.) 465.

she was able to reach a seat.<sup>2</sup> Whether it is negligence for the motorman to start the car without a signal from the conductor depends upon whether it would have been negligent for the conductor to have then given the starting signal.<sup>3</sup> The carrier must use great care, not only in carrying his passenger, but in all preliminary matters, such as his reception into the vehicle provided for his use. In New York, carriers by street car are not required, as matter of law, to provide a conductor to take charge of the car and assist the passengers on and off from the platform. The fact however, that there was no person in charge of the car, aside from the driver, may be considered as a circumstance bearing on the question of the negligence of the defendant. The carrier must allow a passenger a reasonable time to get on and off the car, and if, while the passenger is alighting, the car is started suddenly and so as to produce a jerking motion, it is not of itself an act of carelessness.<sup>4</sup> If a passenger is received on an open electric street car when it is so full he cannot go inside or on the platform and stands on the side step with the knowledge and assent of the conductor, he has the right to assume that reasonable precautions will be taken to protect him from dangers that can be readily seen and guarded against.<sup>5</sup> But it should be remembered, too, that

2. *Dochtermann v. Brooklyn Heights R. Co.*, 164 N. Y. 586, 58 N. E. 1087, affg. 32 App. Div. (N. Y.) 13; *Sheffer v. Louisville, H. & St. L. Ry. Co.*, 22 Ky. L. Rep. 1305, 60 S. W. 403.

3. *Davey v. Greenfield & T. F. St. Ry. Co.*, 177 Mass. 106, 58 N. E. 172.

4. *Ganiard v. Rochester City, etc., R. Co.*, 50 Hun (N. Y.), 22, 24, 2 N. Y. Supp. 470, 18 St. Rep.

(N. Y.) 692; affd., 121 N. Y. 661, 24 N. E. 1092; *Lamline v. Houston, etc., R. Co.*, 14 Daly (N. Y.), 144, 6 St. Rep. (N. Y.) 248; *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 381. And see *Bishop v. Union R. Co.*, 14 R. I. 214.

5. *Bumbear v. United Tract. Co.*, 198 Pa. St. 198, 47 Atl. 961. In the case cited the passenger was standing on the side-step of an open, overloaded summer street

the passenger takes the risk of the ordinary and usual operation of the car, and not every slowing down and starting with a jerk can be claimed to be negligence. The mere fact that a street car is moving along a crowded street at the rate of about two miles an hour and is suddenly stopped, throwing the plaintiff from her seat in the car to the floor, and that the gripman in charge did not stop it, is insufficient to support a finding of negligence in the operation of the car.<sup>6</sup> A passenger seeking to alight, who signals to the conductor as he approaches a street crossing, is not justified in assuming that a subsequent reduction in the speed of the car is made for his convenience in alighting, unless it appear that the conductor had communicated the signal to the gripman, or that the gripman had notice otherwise of the passenger's desire to quit the car.<sup>7</sup> It must appear that there was no other reason for slackening speed and starting again, and that the desire of the passenger to get on board or to alight from the street car was communicated to the employee in charge of the power, in order to make it appear that the

car, was struck by the hub of a wheel of an ice-wagon standing so near the track as to project over the step. The motorman did not slacken his speed till the accident, although he was able to see the position of the wagon when a block from it, and its presence was something to be expected at that time of day, and there was hardly room for it to stand between the tracks and the curb. Held, the motorman's negligence was for the jury. And see *O'Malley v. Met. St. R. Co.*, 3 App. Div. (N. Y.) 259, 73 St. Rep. (N. Y.) 613, 38 N. Y. Supp. 456.

6. *Hoffman v. Third Ave. R. Co.*, 45 App. Div. (N. Y.) 586, 61 N. Y. Supp. 590. And see *Hayes v. Forty-second St., etc., R. Co.*, 97 N. Y. 259; *Poulson v. Brooklyn City R. Co.*, 13 Misc. Rep. (N. Y.) 387, 34 N. Y. Supp. 244, 68 St. Rep. (N. Y.) 123; *Losee v. Watervliet Turnpike & R. Co.*, 63 Hun (N. Y.), 404, 44 St. Rep. (N. Y.) 343, 18 N. Y. Supp. 297; *Bernstein v. D. D., etc., R. Co.*, 72 Hun (N. Y.), 46, 55 St. Rep. (N. Y.) 341, 25 N. Y. Supp. 669.

7. *Armstrong v. Met. St. R. Co.*, 36 App. Div. (N. Y.) 525, 55 N. Y. Supp. 498; *affd.*, 165 N. Y. 641, 59 N. E. 1118.

carrier was negligent in stopping and starting before the passenger was safely aboard or had safely alighted.<sup>8</sup> If the motorman or person in charge of the power of the car be inexperienced and is intrusted with its operation, the company is liable for an injury to a passenger due to a sudden jerk of the car, unless it clearly appear that the jerk was not caused by his inexperience.<sup>9</sup> It is negligence for the motorman to let go of the brake after applying it without knowing whether the dog is set so as to hold it;<sup>10</sup> or if the brake is suddenly and unnecessarily released to the injury of a passenger standing on the platform.<sup>11</sup> A gripman or motorman is negligent toward a passenger if he fail to pay attention to the ringing of a gong on a fire truck and the warnings of bystanders upon approaching a street crossing toward which the truck is rushing toward the track;<sup>12</sup> or, if he drive the car at a rapid rate upon a temporary turnout while a passenger is standing on the front platform;<sup>13</sup> or over an uneven track so that the car swayed from side to side, as a consequence of which a passenger compelled to stand on the side step

8. Bachrach v. Nassau El. R. Co., 35 App. Div. (N. Y.) 633, 54 N. Y. Supp. 958.

9. Etson v. Fort Wayne & B. I. R. Co., 114 Mich. 605, 72 N. W. 598, 4 Det. Leg. N. 692.

10. Etson Case, *supra*; Gilmour v. Brooklyn Heights R. Co., 6 App. Div. (N. Y.) 117, 39 N. Y. Supp. 417; Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277, 42 Pac. 822.

11. Bradley v. Second Ave. R. Co., 34 App. Div. (N. Y.) 284, 54 N. Y. Supp. 256, 12 Am. & Eng. R. Cas. (N. S.) 184. And see West Chicago St. R. Co. v. Johnson, 180 Ill. 285, 54 N. E. 334; Lundy v.

Second Ave. R. Co., 1 Misc. Rep. (N. Y.) 100, 48 St. Rep. (N. Y.) 676, 20 N. Y. Supp. 691; Murray v. Brooklyn City R. Co., 27 St. Rep. (N. Y.) 280, 7 N. Y. Supp. 900; Medler v. Atlanta Ave. R. Co., 36 St. Rep. (N. Y.) 89, 12 N. Y. Supp. 930; Crooks v. Second Ave. R. Co., 49 St. Rep. (N. Y.) 376, 20 N. Y. Supp. 873.

12. Parker v. Met. St. R. Co., 69 Mo. App. 54.

13. Dillon v. Forty-second St., etc., R. Co., 28 App. Div. (N. Y.) 404, 51 N. Y. Supp. 145. And see Seelig v. Met. St. R. Co., 18 Misc. Rep. (N. Y.) 383, 41 N. Y. Supp. 656.

was brought in contact with a trolley pole between the two tracks, although such an accident had never occurred before.<sup>14</sup> A boy, while in the act of mounting the steps of a street car drawn by horses, was thrown down and injured because the driver hurried the horses. In an action therefor, it was held that the question of the carrier's negligence must be submitted to the jury.<sup>15</sup>

**§ 14. Duty of employees in looking after safety and comfort of passengers.**— The conductor of a street car must see to it that a passenger boarding or alighting is in a place of safety before giving the signal to the driver or motorman to proceed; and this rule is particularly applicable where the cars are open summer ones with seats running crosswise and a place between the seats at the sides for the passengers to enter by means of steps running the entire length of the car.<sup>16</sup> He is bound to know in starting the car suddenly and with full force that no person is attempting to embark, or is in a position of danger.<sup>17</sup> But the omission of the conductor to look toward the front platform before giving the signal to start, after stopping the car and permitting a passenger to alight, is not negligence *per se* rendering the company liable for

14. Schmidt v. Coney Isl. B. R. Co., 26 App. Div. (N. Y.) 391, 49 N. Y. Supp. 777. And see Quinn v. Shamokin & M. C. El. R. Co., 7 Pa. Super. Ct. 19.

15. Maher v. Central Park, etc., R. Co., 39 N. Y. Super. Ct. (17 J. & S.) 155; affd., 67 N. Y. 52.

16. Akersloot v. Second Ave. R. Co., 131 N. Y. 599, 30 N. E. 195, 43 St. Rep. (N. Y.) 290; Schalscha v. Third Ave. R. Co., 19 Misc. Rep. (N. Y.) 141, 43 N. Y. Supp. 251; Morrison v. Broadway &

Seventh Ave. R. Co., 130 N. Y. 166, 29 N. E. 105, 41 St. Rep. (N. Y.) 248; McCurdy v. United Tract. Co., 15 Pa. Super. Ct. 29.

17. Cohen v. West Chicago St. R. Co. (C. C. App. 7th C.), 60 Fed. 698; Kinkade v. Atlantic Ave. R. Co., 9 Misc. Rep. (N. Y.) 273, 61 St. Rep. (N. Y.) 323, 29 N. Y. Supp. 747; Walters v. Phila. Tract. Co., 161 Pa. St. 36, 28 Atl. 941; Goldwasser v. Met. St. Ry. Co., 32 Misc. Rep. (N. Y.) 682, 66 N. Y. Supp. 505.

injuries to a boy thrown under the car as he was attempting to mount the front platform, without having previously indicated his desire to do so.<sup>18</sup> The conductor cannot however delegate his authority to any other person, and if he remain in a crowded car and start it on information received from a passenger on the rear platform while another is attempting to board the car and is injured, he is so negligent that recovery may be had against the company.<sup>19</sup> He must take greater care in looking out for those incapable of caring for themselves by reason of extreme age, youth, or illness.<sup>20</sup> He is bound to warn a passenger whom he actually sees in a position or place of peril to life or limb, and contributory negligence is not a legal excuse for the nonperformance of such duty.<sup>21</sup> But he has the right to assume that one who

18. *Pitcher v. People's St. R. Co.*, 174 Pa. St. 402, 34 Atl. 567.

19. *McCurdy v. United Tract Co.*, 15 Pa. Super. Ct. 29.

20. *Wells v. New York, etc., R. Co.*, 25 App. Div. (N. Y.) 365, 49 N. Y. Supp. 510; *Boikens v. New Orleans & C. R. Co.*, 48 La. Ann. 831, 19 So. 737. The carrier is liable for injuries to a child too young to contribute thereto, occasioned from his jumping off the car upon the approach of the conductor to collect his fare in a manner calculated to frighten him. *Sandford v. Hestonville, M. & F. Pass. R. Co.*, 153 Pa. St. 300, 25 Atl. 833.

21. *South Covington & C. St. R. Co. v. McCleave*, 18 Ky. L. Rep. 1036, 38 S. W. 1055; *Baldwin v. Fort Haven & W. R. Co.*, 68 Conn. 567, 37 Atl. 418; *Leavenworth El. R. Co. v. Cusick*, 60 Kan. 590, 6 Am. Neg. Rep. 282, 57 Pac. 519;

*Haluptzok v. Great Northern R. Co.*, 55 Minn. 446, 26 L. R. A. 739; *Booth v. Mister*, 7 Car. & P. 66.

In an action for personal injuries it appeared that the plaintiff was a passenger upon one of defendant's open cars; that when near a street crossing the conductor asked him where he wished to get off and he replied, indicating a street a few blocks above. Assuming the car would stop on the south side of the street, he got out on the running board, and while in that position signaled to stop the car. The conductor pulled the bell cord, but the motorman did not attempt to stop; he increased the power and ran over the crossing, the street being occupied by another street railroad, and in passing over the tracks of the intersecting road plaintiff was jolted from the running board and injured. There was no evidence that the crossing was made in an

hails the car does not intend to board it while in motion, and owes him no duty to warn him off, even if he believe he intends to board the car before it has stopped and doubt his ability to do so.<sup>22</sup> He is not required to exercise critical skill or judgment while in the performance of his ordinary duties in a crowded car, nor to observe closely the incapacity or negligence of a particular passenger; he is held only to that degree of discrimination which a reasonably prudent and observing man would exercise under the circumstances.<sup>23</sup> He acts as the agent of the company in instructing a passenger carried beyond his destination to walk back on the track, and as matter of law is not free from negligence if he make such direction and it requires the passenger to cross a trestle.<sup>24</sup> In determining whether the employees operating the car were negligent, a city ordinance requiring the car to stop before crossing the track of any other company is admissible in evidence where shortly before plaintiff was thrown from the car it had crossed the track of another company without stopping.<sup>25</sup> When an emergency presents itself and a person is under great excitement from the presence of an impending peril, he may not act with that perfect judgment that he would under other and different circumstances and

unusual manner, and therefore it was held that the verdict was properly directed in favor of the defendant; that plaintiff had no right to assume that the car would stop on the south side of the street in going north. *Nies v. Brooklyn Heights R. Co.*, 68 App. Div. (N. Y.) 259.

22. *Holohan v. Washington & G. R. Co.* (D. C.), 18 Wash. L. Rep. 751, 8 Mackey, 316; *Oddy v. West End St. Ry. Co.* (Mass.), 59 N. E. 1026; *Brown v. Seattle City R. Co.*,

16 Wash. 465, 47 Pac. 890; *Craighead v. Brooklyn City R. Co.*, 123 N. Y. 391, 25 N. E. 387, 33 St. Rep. (N. Y.) 620.

23. *Sandford v. Hestonville, M. & F. Pass. R. Co.*, 136 Pa. St. 84, 26 W. N. C. 401, 48 Phila. Leg. Int. 67, 20 Atl. 799.

24. *Camden, G. & W. R. Co. v. Young*, 60 N. J. L. 193, 37 Atl. 1013.

25. *Macon Consol. St. R. Co. v. Barnes* (Ga.), 38 S. E. 756.

still not be negligent. Railways are not liable for a mistaken exercise of judgment upon the part of their servants to act with the utmost possible promptitude when the circumstances are such as to afford no time for deliberation. Where an employee of a railroad company is confronted with a sudden emergency, the failure on his part to exercise the best judgment the case renders possible does not establish lack of care and skill upon his part which renders the company liable. It is not responsible even for his error in judgment.<sup>26</sup>

**§ 15. Boarding.**— In large and populous cities, where cars are constantly receiving and discharging passengers at crossings, it is a well-known fact that many of such passengers board cars and alight therefrom before the car has come to a full stop, irrespective of the motor power, and that they do so usually with perfect safety. It is well known, also, that street-car companies tacitly invite many passengers to board and alight from their cars by checking up to a slow rate of speed and immediately starting up at a greater speed when the passenger is safely aboard or has alighted. It would be impossible to lay down a rule as to what particular rate of speed would be sufficient notice to a passenger that, if he attempted to get on or off, he would be held guilty of

26. Kantrowitz v. Met. St. R. Co., 63 App. Div. (N. Y.) 65, 69, 71 N. Y. Supp. 394, citing Lewis v. Long Isl. R. Co., 162 N. Y. 61, 56 N. E. 548; Wynn v. Central Park, N. & E. River R. Co., 133 N. Y. 575, 30 N. E. 721. It appeared in the Kantrowitz Case that Mrs. Kantrowitz was a passenger on defendant's car, and while it was at a stand-still for the purpose of allowing her and a companion to alight,

a large truck drove up behind it, the pole of which, because the horses slipped, was elevated to such a degree that there was an apparent danger of its running into the car and injuring the passengers. Thereupon the conductor made a motion to start the car and in so doing struck Mrs. Kantrowitz and threw her against the body or the dashboard of the car and injured her knee.

contributory negligence. It would also be a great hardship and unjust to lay down a general rule that a passenger attempting to board any street car while in motion at all should be held in contributory negligence. Every person is expected to know that the boarding of a moving train or car is attended with the danger of a misstep or fall, and a fall beside a moving car is liable to bring some part of the body or limbs in danger of being crushed. It is the duty of those having control and management of cars designed for traffic on the public streets to bring such cars to a full stop at such places as are convenient and necessary for the purpose of discharging and receiving passengers, and it is no less the duty of passengers, in getting on or off such cars, to observe due precaution for their own safety. It cannot be said however that it is inconsistent with ordinary care and caution for a person to board a street car while in motion. Whether one has or has not exercised due care or caution in so doing is to be determined by the particular circumstances in each case, and is therefore a question of fact to be submitted to the jury.<sup>27</sup> It is not sufficient proof of the carrier's negli-

27. C. & P. St. Ry. Co. v. Meixner, 6 Am. Electl. Cas. 404, 409, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331; Omaha St. Ry. Co. v. Martin, 6 Am. Electl. Cas. 417, 48 Nebr. 65; Corlin v. West End St. Ry. Co., 4 Am. Electl. Cas. 406, 154 Mass. 197, 27 N. E. 1000; Hansberger v. Sedalia El. Ry. & L. Co., 82 Mo. App. 566; North Chicago St. R. Co. v. Kaspers, 85 Ill. App. 316; affd., 57 N. E. 849, 186 Ill. 246; Illinois C. R. Co. v. Cheek, 152 Ind. 663, 53 N. E. 641, 1 Rep. 975; Brown v. Washington & G. R. Co., 25 Wash. Law Rep. 404, 11 App.

D. C. 37; N. Chicago St. R. Co. v. Wiswell, 168 Ill. 613, 48 N. E. 407, 9 Am. & Eng. R. Cas. (N. S.) 377; Moylan v. Second Ave. R. Co., 128 N. Y. 583, 37 St. Rep. (N. Y.) 871, 27 N. E. 977; Central Pass. R. Co. v. Rose, 15 Ky. Law Rep. 209, 22 S. W. 745; Picard v. Ridge Ave. Pass. R. Co., 147 Pa. St. 195, 1 Pa. Adv. Rep. 218, 23 Atl. 566; McDonough v. Metropolitan R. Co., 137 Mass. 210; Eppendorf v. Brooklyn City & N. R. Co., 69 N. Y. 195; Slager v. Ridge Ave. Pass. Ry. Co., 119 Pa. St. 70. Trying to board a street car in rapid motion is negligence.

gence merely to show that one attempting to board a street railroad car while barely moving as it reached the street crossing was thrown to the ground and injured.<sup>28</sup> If however the car was started forward with a sudden jerk while the passenger was in the act of boarding, such added circumstance would be sufficient to take the case to the jury.<sup>29</sup> If the passenger be in good physical condition and unincumbered he may, without negligence, attempt to board a slowly-moving car under all ordinary circumstances, and it will be

*Chicago City R. Co. v. Delcourt*, 35 Ill. App. 430. It is not negligence to stand upon the sidewalk to await the car's coming, although at that point the tracks of the company cross the walk to reach the company's barns, and there is a possibility that the car in going to or from the barn will pass over the place where the intending passenger is standing. *O'Toole v. Central Park, N. & E. River R. Co.*, 58 Hun (N. Y.), 609.

28. *Weber v. New Orleans C. R. Co.*, 104 La. 367, 28 So. 892.

Such an one is guilty of contributory negligence as matter of law, when it does not appear that the speed of the car had been reduced in response to his signals. *Reidy v. Met. St. R. Co.*, 27 Misc. Rep. (N. Y.) 527, 58 N. Y. Supp. 326. And before the employees in charge of an electric car can be claimed to be negligent toward an intending passenger, they must either be fairly apprised that the latter desires to board the car, or the situation must be such that the passenger may naturally be expected to get upon the car at that time. *Bachrach v. Nassau El. R. Co.*, 35 App. Div. (N. Y.) 633, 54 N. Y. Supp. 958.

The negligence of the passenger however will not prevent his recovery for injuries due to the negligence of the company if his own negligence in nowise contributed to those injuries. *Fraser v. London St. R. Co.*, 29 Ont. Rep. 411. And see *Woodward v. West Side St. R. Co.*, 71 Wis. 625, 38 N. W. 347.

Where the gravamen of the action is that while plaintiff was attempting to board the street car which had stopped to receive him, it was so suddenly started as to throw him down, and there is conflict of evidence as to whether the car had stopped, it is error for the court to refuse to charge that if it had not stopped and plaintiff was injured while attempting to board it while moving, the verdict must be for the defendant. *Anderson v. Third Ave. R. Co.*, 36 App. Div. (N. Y.) 309, 55 N. Y. Supp. (89 St. Rep.) 290.

29. *Sahlgaard v. St. Paul City R. Co.*, 48 Minn. 232, 51 N. W. 111; *Central Pass. R. Co. v. Rose*, 4 Am. Electl. Cas. 429, 15 Ky. Law Rep. 209, 22 S. W. 745; *People's Pass. Ry. Co. v. Greene*, 56 Md. 84.

even a question for the jury if in boarding he was negligent in not holding fast to the handrail provided for the purpose of aiding him to board.<sup>30</sup> But it has been held to be negligence, as matter of law, for a person, even in good physical condition and unincumbered, to attempt to get on the front platform of a car moving at its ordinary rate of speed of seven or eight miles an hour.<sup>31</sup> But one with packages in both hands, as an umbrella in one hand and a handkerchief in the other, may attempt to board a slowly-moving electric street car without being negligent as matter of law.<sup>32</sup> The street

30. *Martin v. Second Ave. R. Co.*, 3 App. Div. (N. Y.) 448, 38 N. Y. Supp. 220, 73 St. Rep. (N. Y.) 714; *Morrison v. Broadway & S. A. R. Co.*, 130 N. Y. 166, 41 St. Rep. (N. Y.) 248, 29 N. E. 105.

31. *Woo Dan v. Seattle El. R. P. Co.*, 5 Wash. 466, 58 Am. & Eng. R. Cas. 195, 32 Pac. 103; *Pfeffer v. Buffalo R. Co.*, 4 Am. Electl. Cas. 444, 24 N. Y. Supp. 490, 4 Misc. Rep. (N. Y.) 465, 54 St. Rep. (N. Y.) 342; *affd.*, 144 N. Y. 636, 64 St. Rep. (N. Y.) 868. Where however provision is made to get on or off the front or rear platform it may not be negligence to board by the front platform. *Peterson v. D., L. & W. R. Co.* (Pa. Com. Pleas), 9 Kulp, 552. A boy seven years of age, injured in attempting to get upon the front platform of a street railroad car while starting, where no notice was given to the employees in charge of the car and they had no knowledge of his intention and attempt to become a passenger, cannot recover against the company. Although there was no conductor on the car, the driver is not bound to

look for passengers while engaged in attending to his horses. *Pitcher v. People's St. R. Co.*, 154 Pa. St. 560, 32 W. N. C. 243, 26 Atl. 559. A person attempting to board a trolley car in motion by way of the front platform is bound to exercise more care than he would had he waited to board by the rear step or for the car to stop. The fact that there was a jerk or sudden movement of the car when plaintiff jumped on the step did not necessarily establish negligence of the motorman. It might have been the natural result of applying the brake to stop the car. *Paulson v. Brooklyn City R. Co.*, 5 Am. Electl. Cas. 419, 13 Misc. Rep. (N. Y.) 387.

32. *White v. Atlanta Consol. R. Co.*, 92 Ga. 494, 17 S. E. 672. It is different however if the intending passenger carried a package on his shoulder which obstructed his view so that he fell into an excavation while attempting to reach the slowly-moving car. *Hanson v. Third Ave. R. Co.*, 27 Misc. Rep. (N. Y.) 524, 58 N. Y. Supp. 282. And see *Readington v. Philadelphia Tract. Co.*, 132 Pa. St. 154.

railroad company owes a duty to the public to stop at its regular crossings on a seasonable signal to receive those desiring passage.<sup>33</sup> It is the duty of a conductor, before giving the signal to the employee controlling the power to start after the car has stopped to take on passengers, to look around and see that all passengers to take passage at that place are safely on board; and failure so to do is not excused by the fact that he does not see an intending passenger. The car must wait a reasonable time; and a passenger, diligent in attempting to get upon it while it is stopped to receive passengers, although lacking in dexterity, may recover for injuries sustained from the starting of the car while he is attempting to board it.<sup>34</sup> If the car be started when the employees knew, or by the exercise of ordinary care could have known, that the passenger was attempting to board, the company may be made liable for injuries sustained by the intending passenger.<sup>35</sup> He has the right to rely on the

33. Jackson El. R. L. & P. Co. v. Lowry (Miss.), 30 So. 634.

34. Dudley v. Front St. Cable R. Co. (C. C. D. Wash.), 73 Fed. 128; Shwart v. Consol. Tract. Co., 15 Pa. Super. Ct. 26; Post v. Hartford St. Ry. Co., 72 Conn. 362, 44 Atl. 547; Baltimore City Pass. Ry. Co. v. Baer, 90 Md. 97, 44 Atl. 992; Barth v. Kansas City Elev. R. Co., 142 Mo. 535, 10 Am. & Eng. R. Cas. (N. S.) 281, 44 S. W. 778; De Rozas v. Met. St. R. Co., 13 App. Div. (N. Y.) 296, 43 N. Y. Supp. 27; Anacosta & P. River R. Co. v. Klein, 8 App. D. C. 75, 24 Wash. L. Rep. 117; Meriwether v. Kansas City Cable R. Co., 45 Mo. App. 528; Steeg v. St. Paul City R. Co. (Minn.), 52 Am. & Eng. R. Cas. 550, 16 L. R. A. 379, 20 Wash. L.

Rep. 541, 52 N. W. 393; Myers v. Long Isl. R. Co., 10 St. Rep. (N. Y.) 430; affd., 112 N. Y. 681; Black v. Brooklyn City R. Co., 108 id. 640, 15 N. E. 389; Kinkade v. Atlantic Ave. R. Co., 9 Misc. Rep. (N. Y.) 273, 61 St. Rep. (N. Y.) 323, 29 N. Y. Supp. 747; affd., 149 N. Y. 615. It is a question for the jury as to the negligence of the carrier, although the conductor's arm is raised as if to take hold of the bell rope while the passenger is attempting to get on and the time for boarding the car has passed. McQuade v. Manhattan Ry. Co., 53 N. Y. Super Ct. (21 J. & S.) 91. And see Packard v. Toledo Tract. Co., 22 Ohio C. C. 578.

35. Worthington v. Lindell R.

due care of the company, and is not bound to anticipate that the car will start suddenly and throw him upon the ground or against poles or other obstruction in close proximity to the track.<sup>36</sup> Evidence that the conductor knew

Co., 72 Mo. App. 162; West Chicago St. R. Co. v. James, 69 Ill. App. 609; Sexton v. Met. St. R. Co., 40 App. Div. (N. Y.) 26, 57 N. Y. Supp. (91 St. Rep.) 577, 6 Am. Neg. Rep. 135.

Attempting to get on a moving street car, plaintiff seized the hand-rail and placed one foot on the step; with the other on the ground, he was dragged along until he came in contact with some railroad ties near the track in the middle of an intersecting street where he lost his hold and was severely injured. Whether the speed of the car was increased after plaintiff took hold was a question of fact. No proof was offered that the motorman in anyway indicated that he meant to stop at the upper corner of the street where plaintiff stood and attempted to get on the car, and he stated that he did not notice any one there. It was held that plaintiff was not entitled to recover, since being in full view of the ties, he assumed all risk of injury from them when he attempted to get on the moving car. Schmidt v. North Jersey St. Ry. Co. (N. J. Sup.), 49 Atl. 438.

36. Citizens' St. Ry. Co. v. Merl (Ind. App.), 59 N. E. 491. But one who has signaled the conductor to stop as the car is nearing a street crossing is not justified in assuming that a sudden reduction in speed is made for his convenience in the absence of knowledge

that the conductor has communicated his signal to the gripman. Armstrong v. Met. St. R. Co., 36 App. Div. (N. Y.) 525, 55 N. Y. Supp. (89 St. Rep.) 498; affd., 165 N. Y. 641, 59 N. E. 1118. And where his injuries are sustained while in the act of boarding, evidence that after the car had stopped it moved slowly backward causing him to fall, is sufficient to justify a finding that his injuries were caused by defendant's negligence, where there was also evidence that he made a misstep in trying to board the car, and that the backward movement, if any, was insufficient to cause him to fall. Schmeltzer v. St. Paul City Ry. Co. (Minn.), 82 N. W. 1092. A verdict for plaintiff is not against the weight of evidence where the issue was whether defendant's street car was in motion when plaintiff attempted to board it. Plaintiff testified that it was not; his testimony was contradicted by one of the conductors and a passenger and by a statement signed by plaintiff made to a person employed by defendant to prepare the defense in its accident cases, who testified that he wrote the statement at plaintiff's dictation and read it to him before he signed it; plaintiff testified however that he did not know what was put in the statement. Pohle v. Second Ave. R. Co., 13 App. Div. (N. Y.) 393, 42 N. Y. Supp. 1092; affd., 161 N. Y. 666, 57 N. E. 1122. And

that a truck was standing close to the track and that several persons were attempting to get on the car and that he started the car before plaintiff was able to get on the platform by reason of other persons being ahead of him, and that plaintiff was injured thereby, is sufficient to sustain a judgment against the carrier.<sup>37</sup> The fact that a signal for starting the car, causing one who is attempting to get on to be thrown down and injured, was given by an unauthorized person, will not relieve the company from liability, if the conductor by due diligence could have prevented the moving of the car and avoided the injury by countermanding the signal, or otherwise, although he did not know that any one was attempting to get on the car.<sup>38</sup> But it is not as matter of law negligence for the driver of a street car to fail to bring the car to a full stop to allow one, who has given him a signal, to get on board.<sup>39</sup> If the intending passenger boards the car while in motion, unless its motion has been stopped suf-

see Sweeny v. Union Ry. Co., 64 N. Y. Supp. 453; Leary v. Railroad Co., 173 Mass. 373.

37. Goldwasser v. Met. St. R. Co., 66 N. Y. Supp. 505, 32 Misc. Rep. (N. Y.) 682. And see Call v. Portsmouth, K. & Y. St. Ry. (N. H.), 45 Atl. 405; Dean v. Third Ave. R. Co., 34 App. Div. (N. Y.) 220, 54 N. Y. Supp. 490, 5 Am. Neg. Rep. 226; Christie v. Galveston City Ry. Co. (Tex. Civ. App.), 2 Am. Neg. Rep. 260, 39 S. W. 638; Faris v. Brooklyn City & N. R. Co., 46 App. Div. (N. Y.) 231, 61 N. Y. Supp. (95 St. Rep.) 670; Wallace v. Third Ave. R. Co., 36 App. Div. (N. Y.) 57, 55 N. Y. Supp. (89 St. Rep.) 132.

38. North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958;

McCurdy v. United Tract. Co., 15 Pa. Super. Ct. 29.

39. Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 5 Am. & Eng. R. Cas. (N. S.) 393, 45 Pac. 996; Moylan v. Second Ave. R. Co., 128 N. Y. 583, 37 St. Rep. (N. Y.) 871, 27 N. E. 977.

A person seeking to become a passenger on a street car has the right to insist that it shall come to a stop to enable him to do so; but if the car does not stop, the carrier is not at fault if he attempts to board while the car is in motion, unless its speed is so diminished as to amount to an invitation to him to get upon it and then is subsequently accelerated without notice while he is in the act of getting on; where however it is al-

ficient to imply an invitation, the company can only be made liable for an act of gross negligence implying a willful or wanton injury.<sup>40</sup> But negligence, if there be any, in boarding an overcrowded car, will not prevent recovery for an injury to which the overcrowded condition of the car did not contribute.<sup>41</sup> And if the conductor attempt to assist the intending passenger to board the car while in motion and releases him at his own request, the company cannot be held for negligence if he fall and be run over by the car.<sup>42</sup> Where it appears that a boy while in the act of mounting the steps of a street car drawn by horses is thrown by the act of the driver in hurrying the horses, and the boy is thereby injured, there is sufficient evidence of negligence on the part of the carrier to submit the case to the jury.<sup>43</sup>

**§ 16. Carrying packages, live animals, and dangerous weapons in the cars.**— A conductor is justified in removing from his car a passenger who, in defiance of a rule of the company against the carrying of dogs, has a dog with him which he refuses to remove on a request so to do by the conductor.<sup>44</sup> And in an action against the carrier for the ejection, or the

leged as the foundation of the action that the car having stopped was started before he was able to get upon it, the fact of the stopping of the car is essential to his case. *Savage v. Third Ave. R. Co.*, 29 App. Div. (N. Y.) 556, 59 N. Y. Supp. 1066.

40. *Basch v. North Chicago St. R. Co.*, 40 Ill. App. 583.

41. *West Chicago St. R. Co. v. Marks*, 82 Ill. App. 185.

42. *Baltimore Tract. Co. v. State, Ringgold*, 78 Md. 409, 58 Am. & Eng. R. Cas. 200, 28 Atl. 397. Negligence of the passenger in board-

ing a moving car does not relieve the company from responsibility for injuries arising from the negligent act of the employee in pushing him off the step. *Sharer v. Paxson*, 171 Pa. St. 26, 2 Am. & Eng. R. Cas. (N. S.) 429, 33 Atl. 120, 37 W. N. C. 319.

43. *Maher v. Central Park, N. & E. River R. Co.*, 39 N. Y. Super. Ct. (17 J. & S.) 155; affd., 67 N. Y. 52.

44. *Butler v. Steinway Ry. Co.*, 87 Hun (N. Y.), 10; *Gregory v. Chicago & N. W. R. Co.*, 100 Iowa, 345, 69 N. W. 532.

refusal to accept a passenger carrying in his arms or leading a live animal, it is error to submit to the jury the reasonableness of a regulation of the company forbidding the carrying of live animals in the cars.<sup>45</sup> It is error also to submit to the jury the question of the reasonableness of a rule that passengers must not be permitted to take into the cars packages or goods that are cumbersome, or otherwise, such as barrels, boxes, trunks, gas pipe, lumber, and panes of glass.<sup>46</sup> But where the rule of the company imposes an extra charge for each package "too large to be carried on the lap of the passenger without incommoding others," while the rule may be assumed to be a reasonable one, it is yet for the jury to determine whether a particular package comes within the intent and meaning of the rule.<sup>47</sup> A street railroad com-

45. As for example, a live goat. *Daniel v. North Jersey St. Ry. Co.* (N. J.), 46 Atl. 625.

46. *Dowd v. Albany Ry.*, 47 App. Div. (N. Y.) 202, 62 N. Y. Supp. (96 St. Rep.) 179. In the case cited the passenger carried a valise and two rifles with bayonets attached. The court submitted to the jury the question whether or not the guns carried in the manner in which they were carried were dangerous, and whether the rule itself was reasonable. Held error, the court saying: "The plaintiff, incumbered with the valise, carried these two rifles with bayonets attached in his hands, in the closed street car, in which there were a number of passengers, and passengers getting on and off at every crossing. The two guns, rigged and carried in that way by one man with a valise, also, were

so obviously dangerous to others in the same car that it needed only the declaration of the conductor in charge to exclude the passenger proposing to ride so incumbered; and his declaration to that effect should have been conclusive, and the court should have instructed the jury that the only question for them to consider was whether unnecessary force was used in putting the plaintiff off the car, and if so, what was the damage suffered because of such unnecessary force."

47. *Morris v. Atlantic Ave. R. Co.*, 116 N. Y. 552, 22 N. E. 1097, 27 St. Rep. (N. Y.) 667, revg. 5 id. 874. In the case cited—an action for assault and battery occasioned in being ejected from a car—it appeared the plaintiff carried two packages of picture frames about two feet in length and twenty inches wide and refused

pany cannot be charged with negligence because it permits passengers to carry small packages with them into the car and place them on the floor between or near their feet, unless

to pay an additional charge therefor, or to leave the car. The court said:

"In respect to the other proposition, the court was requested to hold, as matter of law, and charge the jury, that the bundles were too large to be carried on the lap of the passenger without incommodating others. Exception was taken to the refusal to so charge. And the court was further requested, and declined, to charge that 'the question as to whether the packages were too large was not a matter to be decided by the plaintiff, but is to be decided by the defendant, and if its agents in the exercise of fair judgment, and in good faith, determine that a package is too large and requires pay, the passenger must comply with a request to pay or leave the car,' and exception was taken to such refusal. For the successful operation of the road, and for the accommodation and comfort of its passengers, certain regulations are evidently essential. The one in question was reasonable, but that portion of it relating to the present case is indefinite in so far that it does not in terms furnish all the information necessary to its execution, which is dependent upon the fact that the package is too large to be carried in the lap of the passenger without incommodating others. A package may be such and so large as to require the conclusion that it is 'within the rule

which entitles the company to demand the increased fare, and in such case the court might, as matter of law, so determine. When it does not necessarily so appear, the question arising, in that respect, becomes one of fact to be otherwise disposed of. In the present case the court could not hold that the package was within the meaning of those referred to in the regulation. The right of the plaintiff was dependent upon the application of the regulation to his package, and not upon the judgment of the conductor. The ability of the latter to construe the regulation, and to determine whether the package justified the demand of more fare, may have been greater than that of the plaintiff, but their right to exercise their judgments in that respect, subject to the consequences, was not unequal. The question was for the jury to determine whether the extent of the plaintiff's package was such as to be embraced within the meaning of the regulation. The question is one of the weight of evidence, which was solely for the consideration of the court below. If the execution of this portion of the regulation is liable to be attended with embarrassment, it is because its terms, descriptive of the packages referred to, are not sufficiently definite to furnish a certain guide to the company's servants, who are required to execute it."

they become obviously an obstruction to passengers in going to and from their seats. It is quite usual and customary for passengers to carry with them hand packages and baskets and umbrellas and other small parcels, and no rule for their exclusion has ever been adopted by any carrier company. Indeed, it may well be doubted that the carrier could enact such a rule. It might become the duty of conductors to cause the removal of even a small package upon complaint of inconvenience, or nuisance, or obstruction to other passengers, but no rule can be laid down for his guidance in this particular, except that he is bound to do what a reasonable man would do under the circumstances.<sup>48</sup>

**§ 17. Crowding cars.**—A carrier of passengers must exercise the care of a very cautious person surrounded by the same circumstances.<sup>49</sup> The employees of a street railway company therefore are bound to exercise greater care where a passenger is forced to ride upon the step or platform, because he cannot find a seat in the car.<sup>50</sup> Where the street car company undertakes to carry more passengers than can sit or stand within the street car, crowding both platforms and steps to their utmost capacity, the question of the carrier's negligence in an action for injuries sustained by a person forced off the front platform by the crowd while attempting to ride there, after having given up his seat to another, is for the jury.<sup>51</sup> It can never be said that it is negligence,

48. *Van Winkle v. Brooklyn City R. Co.*, 46 Hun (N. Y.), 565. And see *Stimson v. Milwaukee, etc., Ry. Co.*, 75 Wis. 381, 44 N. W. 748.

49. *Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682; *Taylor v. Pa. Co. (C. C. N. D. Ohio)*, 50 Fed. 755.

50. *Kinkade v. Atl. Ave. R. Co.*, 9 Misc. Rep. (N. Y.) 273, 61 St. Rep. (N. Y.) 323, 29 N. Y. Supp. 747; *Saltzman v. Brooklyn City R. Co.*, 73 Hun (N. Y.), 567, 56 St. Rep. (N. Y.) 220, 26 N. Y. Supp. 311; *affd.*, 148 N. Y. 745.

51. *Lehr v. S. & H. P. R. Co.*, 118 N. Y. 556, 30 St. Rep. (N.

as matter of law, on the part of a street railroad company to permit a car to become crowded with passengers.<sup>52</sup> An unusual, extraordinary demand for transportation of passengers may occur, and the carrier should be held only to such diligence as is reasonable under the circumstances.<sup>53</sup> It must however take care, under such circumstances, that the passenger is not exposed to unnecessary danger, either by the speed at which the car is permitted to round the short curves or from contact with objects near the track.<sup>54</sup> If by due

Y.) 1, 23 N. E. 889; Neslie v. Second & Third Sts. Pass. Ry. Co. (1886), 113 Pa. St. 300, 6 Atl. 72; Chicago City Ry. Co. v. Young, 62 Ill. 238; Highland Ave. & Belt R. Co. v. Donovan, 94 Ala. 299, 10 So. 139. So, where the motorman of an open car, which was so crowded that passengers were standing upon the running board, before stopping to receive another passenger, signaled a van in front of it to leave the track, which it did, stopping in such a situation as to bring its rear end within two feet of the track, it was held that he was chargeable with notice that the space left between the van and the car was insufficient to allow persons standing upon the running board to escape injury, and it was the duty of those running the car to exercise great care to see that injury was not inflicted upon such passengers. Henderson v. Nassau El. R. Co., 46 App. Div. (N. Y.) 280, 61 N. Y. Supp. (95 St. Rep.) 690. And see Reem v. St. Paul City Ry. Co. (Minn.), 80 N. W. 638; Railway Co. v. Higgs, 38 Kan. 375, 16 Pac. 667; Hansen v. New Jersey St. Ry. Co. (N. J.), 46 Atl. 718; Graham v.

Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917.

52. Chicago City R. Co. v. Con sodine, 50 Ill. App. 471.

53. Chicago & A. R. Co. v. Fisher, 31 Ill. App. 36. But it has been held that the carrier of passengers is chargeable with negligence in permitting passengers to crowd upon the platform of a car and thereby push a passenger's leg between two cars, where it has control over the avenues of access to the cars and can control the number of passengers boarding the same. Dawson v. N. Y. & B. Bridge, 31 App. Div. (N. Y.) 537, 52 N. Y. Supp. (86 St. Rep.) 133. And see Muhlhouse v. Monon St. Ry. Co. (Pa.), 50 Atl. 940; Indianapolis St. Ry. Co. v. Robinson (Ind.), 61 N. E. 936.

54. Schaefer v. Union R. Co., 29 App. Div. (N. Y.) 261, 51 N. Y. Supp. 431; Wood v. Brooklyn City R. Co., 6 Am. Electl. Cas. 429, 5 App. Div. (N. Y.) 492, 38 N. Y. Supp. 1077; Lucas v. Met. St. Ry. Co., 56 App. Div. (N. Y.) 405, 67 N. Y. Supp. (101 St. Rep.) 833; Holloway v. Pasadena & P. Ry. Co., 130 Cal. 177, 62 Pac. 478. Evidence that the passenger on a

care the passenger himself might have avoided the dangerous position in which he was standing, and if the position would appear dangerous to a person in the exercise of ordinary care, the jury may find that the passenger is contributorily negligent.<sup>55</sup> If, without the knowledge of the conductor, he ride upon the bumper in the rear of and outside the trolley car, because the car is crowded so that he cannot even find standing room on the platform, and is struck and injured by a car coming up behind, the place being so obviously dangerous and exposed to the very danger which caused the injury, he is guilty of negligence as matter of law.<sup>56</sup> So, if

crowded car, and therefore standing on the running board, was thrown off by a sudden, violent jerk of the car, justifies a finding that the fall was due to negligence in the operation of the car. *Brainard v. Nassau El. R. Co.*, 44 App. Div. (N. Y.) 613, 61 N. Y. Supp. 74. But where it appeared only that he was holding on to one of the stanchions or upright parts of the car, having an umbrella in the hand by which he was holding fast and lost his hold while the car was going at a high rate of speed, and fell into the street, and he testified that there was a rocking, jolting, or wagging motion, and that his hand slipped from the upright, but there was no evidence showing why it slipped; and there was no sudden or unexpected motion at the time either of the car or of the passengers; it was held that since the proximate cause of the injury was the slipping of his hand from the stanchion, which might have been caused by the fact that the same was wet or because plaintiff was exhausted in his

efforts to hold on, or by a conjunction of causes, there was no proof that the injury was due to the defendant's negligence, and hence a recovery could not be had. *Johnson v. Brooklyn H. R. Co.*, 63 App. Div. (N. Y.) 374, 71 N. Y. Supp. 568.

55. *Asbury v. Charlotte Ry., L. & P. Co.*, 125 N. C. 568, 34 S. E. 654; *Pomaski v. Grant*, 119 Mich. 675; *Sweeney v. Railway Co.*, 150 Mo. 385; *International & G. N. R. Co. v. Williams*, 20 Tex. Civ. App. 587; *Graham v. McNeill*, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 5 Am. Neg. Rep. 484, 12 Am. & Eng. R. Cas. (N. S.) 149; *Harden v. Railway Co.*, 102 Wis. 213; *Chesapeake & O. Ry. v. Langs, Admr.*, 100 Ky. 221.

56. *Bard v. Pa. Tract. Co.*, 6 Am. Electl. Cas. 444, 176 Pa. St. 97, 34 Atl. 953; *Nieboer v. Detroit El. Ry.* (Mich.), 87 N. W. 626, 8 Det. Leg. N. 745, 23 Am. & Eng. R. Cas. (N. S.) 93. Where the plaintiff's intestate was permitted to ride on the bumper of an electric street car, and while in

he be crowded off the platform of the car by other passengers, where there was plenty of room inside the car, although he had assumed such position after notifying the conductor to stop at a certain street, which was not done, and the accident occurred while he was waiting for the next street to be reached, he cannot recover for any injury occasioned thereby.<sup>57</sup> So, too, if he project his body outward from the outer edge of the footboard so as to bring it in contact with a pole, where he is familiar with the surroundings, he is held to have contributed to his own injury.<sup>58</sup> If he voluntarily ride upon the front platform of a closed car, he assumes the usual and ordinary dangers of the position.<sup>59</sup> But it is not

that position a fare was collected from him, a railroad company was held liable for personal injuries inflicted on him by its permitting a car to approach from the rear and collide with the car on which intestate was standing, thereby causing his death, it being broad daylight, and gross negligence being apparent. *Grieve v. New Jersey St. R. Co.* (N. J. Sup.), 47 Atl. 427.

57. *Glyn v. N. Y. & H. R. Co.*, 85 Hun (N. Y.), 408, 32 N. Y. Supp. 1021, 66 St. Rep. (N. Y.) 426.

58. *Sibley v. New Orleans City & L. R. Co.*, 49 La. Ann. 588, 21 So. 851. One is negligent, who, on a crowded car, stands with one foot on the lower step and the other on the platform, crowded between two men, and falls off as the car was passing in its ordinary motion jolting over another railroad track at a cross-street. *Barry v. Union Tract. Co.*, 194 Pa. St. 576, 45 Atl. 321. And see *Birmingham Ry. & El. Co. v. James*, 121 Ala. 120; *Kennon v. Railroad Co.*, 51 La. Ann. 1599; *Bartley v.*

*Railway Co.*, 148 Mo. 124; *Ward v. Central Park, etc., R. Co.*, 11 Abb. Pr. (N. S.) (N. Y.) 411, 42 How. Pr. (N. Y.) 289; *Mack v. D. D., etc., R. Co.*, 2 Week. Dig. (N. Y.) 251.

59. *Cassidy v. Atl. Ave. R. Co.*, 9 Misc. Rep. (N. Y.) 275, 61 St. Rep. (N. Y.) 149, 29 N. Y. Supp. 724, distinguishing *Nolan v. Brooklyn City, etc., Ry. Co.*, 87 N. Y. 63; *Murray v. Brooklyn City R. Co.*, 27 St. Rep. (N. Y.) 280, 7 N. Y. Supp. 900; *Medler v. Atl. Ave. R. Co.*, 36 St. Rep. (N. Y.) 89, 12 N. Y. Supp. 930; affd., 126 N. Y. 669; *Watson v. Portland & C. E. R. Co.*, 91 Me. 584, 11 Am. & Eng. R. Cas. (N. S.) 194, 64 Am. St. Rep. 268, 40 Atl. 699; *Elliott v. Newport St. R. Co.*, 18 R. I. 707, 23 L. R. A. 208; *Wilde v. Lynn & B. R. Co.*, 5 Am. Electl. Cas. 414, 163 Mass. 533, 40 N. E. 851; *Reber v. Pittsb. & B. Tract. Co.*, 6 Am. Electl. Cas. 446, 179 Pa. St. 339; 36 Atl. 245; *Mt. Adams & Eden Park Inc. R. Co. v. Reul*, 4 Ohio C. C. 362; *Randall v.*

negligent, as matter of law, for a passenger on a street car to ride on the front platform,<sup>60</sup> and a request by the conductor of a street car that male passengers vacate their seats in favor of ladies and stand upon the platform of the car is such a direction by one clothed with authority and who represents the company in the management of the car, so far as concerns the location of the passengers, as will entitle a passenger complying therewith to recover for personal injuries sustained in collision with a car coming up from behind if his own negligence did not contribute to the injuries.<sup>61</sup>

*Regulations as to entering, occupying, or leaving cars.*—Among the reasonable regulations which the carrier by street car may make is one prohibiting passengers from getting on or off the front end of the car, and requiring them to enter and to leave by the rear platform only. If such a regulation be violated voluntarily and without the consent of the company, express or implied, it is such conclusive evidence of negligence on the part of the passenger that it will defeat an action against the carrier notwithstanding its negligence.<sup>62</sup>

The fact that such a regulation was conspicuously posted

Frankfort & S. Pass. Ry. Co., 8 Pa. Co. Ct. 277.

60. Hourney v. Brooklyn City R. Co., 27 St. Rep. (N. Y.) 49, 7 N. Y. Supp. 602; affd., 130 N. Y. 641; Nolan v. Brooklyn City & N. R. Co., 87 id. 63, 13 Week. Dig. (N. Y.) 286; Taft v. Brooklyn H. R. Co., 14 Misc. Rep. (N. Y.) 390, 70 St. Rep. (N. Y.) 750, 35 N. Y. Supp. 1042; Seelig v. Met. St. R. Co., 18 Misc. Rep. (N. Y.) 383; Kean v. West Chicago St. R. Co., 75 Ill. App. 53, 30 Chic. Leg. N. 201; Ginna v. Second Ave. R. Co., 67 N. Y. 596.

61. Terre Haute El. R. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703, 5 Am. Neg. Rep. 581, 1 Rep. 576. And see Still v. Nassau El. R. Co., 32 App. Div. (N. Y.) 276, 52 N. Y. Supp. 975; Trumbull v. Erickson (U. S. C. C. App. Colo.), 38 C. C. A. 536, 97 Fed. 891; McGrath v. Brooklyn, Q. C. & S. R. Co., 87 Hun (N. Y.), 310, 34 N. Y. Supp. 365; Francisco v. Troy & L. R. Co., 88 Hun (N. Y.), 464, 34 N. Y. Supp. 859.

62. Baltimore City Pass. Ry. Co. v. Wilkinson, 30 Md. 224.

inside of all the cars and that the plaintiff had often previously ridden on those cars is evidence from which it may be inferred that he had notice of its existence.<sup>62</sup> But, although the notice be so posted, if the employees of the carrier were accustomed to receive passengers in such number as to crowd the front platform, and make no objections to passengers riding there, in an action for an injury to a passenger so riding, the question of his negligence is one for the jury. The jury may find that the carrier had waived the enforcement of the rule.<sup>63</sup> If the rule of the carrier prohibits smoking "except on the front platform," and passengers are allowed to go there to smoke, the rule may be deemed waived.<sup>64</sup>

**§ 18. Riding on platform, running-board, or steps.**—As has been substantially stated in the last preceding section, riding on the running-board or the front platform of a crowded street car is not negligent in itself.<sup>65</sup> The provisions of the

62. See note 62 on page 471.

63. Sweetland v. Lynn & B. R. Co., 177 Mass. 574, 51 L. R. A. 783, 59 N. E. 443.

64. Vail v. Broadway R. Co., 147 N. Y. 377, 70 St. Rep. (N. Y.) 33, affg. 31 Abb. N. C. (N. Y.) 56, 6 Misc. Rep. (N. Y.) 20, 58 St. Rep. (N. Y.) 124, 26 N. Y. Supp. 59. And see Bradley v. Second Ave. R. Co., 34 App. Div. (N. Y.) 284, 12 Am. & Eng. R. Cas. (N. S.) 184, 54 N. Y. Supp. 256; Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 299, 10 So. 139, 5 Am. & Eng. R. Cas. 568.

65. Brainard v. Nassau El. R. Co., 44 App. Div. (N. Y.) 613, 61 N. Y. Supp. 74; Scott v. Bergen Co. Tract. Co. (N. J.), 48 Atl. 1113. And see 43 id. 1060, 4 Chic. L. J.

Week. 379; West Chicago St. R. Co. v. Marks, 82 Ill. App. 185; Pray v. Omaha St. Ry. Co., 5 Am. Electl. Cas. 407, 44 Nebr. 167, 62 N. W. 447, 11 Am. R. Corp. Rep. 522, 48 Am. St. Rep. 717; N. Chicago St. R. Co. v. Williams, 29 N. E. 672, 140 Ill. 275, affg. 40 Ill. App. 590; Upham v. Detroit Citizens' R. Co., 85 Mich. 12, 12 L. R. A. 129, 48 N. W. 199; Sandford v. Hestonville, M. & F. Pass. R. Co., 136 Pa. St. 84, 26 W. N. C. 401, 20 Atl. 799; Harbison v. Met. R. Co. (D. C. App.), 24 Wash. L. Rep. 438, 9 App. D. C. 60; Doolittle v. So. Ry. Co., 62 S. C. 130, 40 S. E. 133; Geitz v. Milwaukee City R. Co., 72 Wis. 307, 39 N. W. 866; Willmott v. Corrigan Consol. St. R. Co., 106 Mo. 534, 17 S.

New York Railroad Law in relation to the liability of railroad companies for injuries to passengers while on the platform do not apply to street railroad companies.<sup>66</sup> If however there is room to be seated inside the car and no special reason exists why the passenger should not occupy it, he is negligent, as matter of law, in remaining on the platform.<sup>67</sup>

W. 490; Townsend v. Binghamton, 57 App. Div. (N. Y.), 234, 68 N. Y. Supp. 121; McGrath v. B., Q. C. & S. R. Co., 5 Am. Electl. Cas. 422, 87 Hun (N. Y.), 310; Marion St. Ry. Co. v. Shaffer, 4 Am. Electl. Cas. 458, 9 Ind. App. 486, 36 N. E. 861; Bailey v. Tacoma Tract. Co., 16 Wash. 48, 47 Pac. 241; Adams v. Washington & G. R. Co. (D. C. App.), 9 App. D. C. 26, 24 Wash. L. Rep. 364; Dillon v. Forty-second St., etc., R. Co., 28 App. Div. (N. Y.) 404, 51 N. Y. Supp. 145; Hassen v. Nassau El. Ry. Co., 34 App. Div. (N. Y.) 71, 53 N. Y. Supp. 1069; Muldoon v. Seattle City R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794.

In Missouri it was held that it was error to instruct the jury that if the plaintiff was riding on the footboard of a grip car when it was running at its usual speed, he was guilty of contributory negligence unless he was a passenger, since his status as a passenger cannot affect the question of his negligence. Raming v. Met. St. Ry. Co., 157 Mo. 477, 57 S. W. 268. The passenger's negligence in riding on the platform will not prevent a recovery for his death if the injuries would have been inflicted upon him in the same manner had he ridden elsewhere upon

the car. Birmingham Ry. & E. Co. v. James, 121 Ala. 120, 25 So. 847.

66. Vail v. Broadway R. Co., 147 N. Y. 377, 70 St. Rep. (N. Y.) 33; Lax v. Forty-second St., etc., R. Co., 46 N. Y. Super. Ct. (14 J. & S.) 448; Hayes v. Forty-second St., etc., R. Co., 97 N. Y. 259. In the case first cited, the court said: "The general purpose of the act of 1850 (Railroad Law then in question) was to provide for the operation of steam railroads. It is perfectly manifest and has always been conceded that many of its provisions can have no application whatever to street railroads. In the nature of things, a provision of this character, intended primarily to prevent accidents and injuries to passengers on trains operated by steam and running at a high rate of speed, is not applicable to a street railroad, the cars of which are drawn through city streets at the rate of a few miles per hour. The danger to passengers standing upon the platform of steam cars when in motion is great and obvious, while that of passengers on the platform of street cars is almost nothing, as is fully demonstrated by the practice of the general public and the companies themselves." (p. 381.)

67. Thane v. Scranton Tract. Co.,

A passenger however may go out of the car as it approaches his destination, and he will not be necessarily guilty of negligence because he stood on the platform with his back against the dashboard, and by a sudden jerk of the car was thrown into the street.<sup>68</sup> But, if he thus voluntarily places himself upon the platform or step of the car when it is in motion and is thrown off by the increase of the speed of the car, which happens before he has indicated to any of the agents of the company that he intends to alight, such an increase of speed, unaccompanied by any other fact, cannot be the foundation of a charge against the company of negligence.<sup>69</sup> The passenger is not necessarily negligent if, under direction of the conductor to obtain a transfer from the conductor of the rear car, he attempts to go to the rear car just as the train starts; but he is not justified in attempting to pass from one footboard to another while the train is in motion;<sup>70</sup> nor is he justified in riding upon the rear platform when there is ample standing room inside the car in which there are straps unto which he may cling while standing.<sup>71</sup> But a woman's want of reasonable care in getting upon a crowded street car and attempting to ride upon the platform because she is unable to get within the car, will not relieve the street car company from liability for injuries due to her being thrown from the platform, if, knowing her situa-

191 Pa. St. 249, 43 Atl. 136, 6 Am. Neg. Rep. 185, 4 Chic. L. J. Week. 260; Bradley v. Second Ave. R. Co., 90 Hun (N. Y.), 419, 70 St. Rep. (N. Y.) 622, 35 N. Y. Supp. 918; Mann v. Phila. Tract. Co., 175 Pa. St. 122, 34 Atl. 572.

68. N. Chicago St. R. Co. v. Baur, 179 Ill. 126, 53 N. E. 568, 45 L. R. A. 108.

69. Sims v. M. E. R. Co., 65 App. Div. (N. Y.) 270, 276.

70. Eickhof v. Chicago N. S. R. Co., 74 Ill. App. 196.

71. Ward v. Central Park R. Co., 11 Abb. Pr. (N. S.) (N. Y.) 411; Aikin v. Frankford & S. P. City Pass. R. Co., 142 Pa. St. 47, 21 Atl. 781; Andrews v. Capital City, etc., R. Co., 2 Mackey (D. C.), 137.

tion and consequent danger, it might, by exercise of reasonable care, under the circumstances, have prevented injury to her.<sup>72</sup> Where it is customary for the passengers, with the consent of the carrier, to use the running-board of an open street car, not only as a means for ingress and egress, but also to pass from one part of the car to another, the question of negligence, in case of accident, cannot be properly answered without considering this circumstance. Standing upon the running-board, the passenger must take reasonable care to avoid accident; and it cannot certainly be said that the carrier is negligent in permitting the passenger to use the running-board as a standing place.<sup>73</sup> Courts will not draw distinction between footboards and seats upon a street car as places of relative danger and safety in view of the

72. Met. R. Co. v. Shashall (D. C. App.), 22 Wash. L. Rep. 377.

73. Citizens' St. R. Co. v. Hoffbauer, 23 Ind. App. 614, 56 N. E. 54; West Chicago St. Ry. Co. v. Marks, 182 Ill. 15, 55 N. E. 67; Faris v. Brooklyn City & N. R. Co., 46 App. Div. (N. Y.) 231, 61 N. Y. Supp. 670; Asbury v. Charlotte El. Ry., L. & P. Co., 125 N. C. 568, 34 S. E. 654.

In the Hoffbauer Case, *supra*, it appeared that the street car was running backward on the single track and soon after turned on to a double track with the footboard within a few inches of the trolley poles; plaintiff, ascertaining that he was being carried away from his destination, and without seeing the poles, stepped from a seat on to the running board and started for the rear of the car to get a transfer, when he was struck by one of the poles and injured. No

warning was given that it was unsafe for him to step on the running board, or that the car was running on the wrong track. Held, the questions of the carrier's negligence and of the passenger's contributive negligence were for the jury; citing Cogswell v. Railway Co., 5 Wash. 46, 31 Pac. 411; Railway Co. v. Scott, 86 Va. 902, 11 S. E. 404; Railway Co. v. Rude, 62 Ill. App. 550; Railroad Co. v. Cook, 145 Ill. 551, 33 N. E. 958; Elliott v. Railway Co., 18 R. I. 707, 28 Atl. 331, 31 id. 694, 23 L. R. A. 208; Railway Co. v. McCleave (Ky.), 38 S. W. 1055; Railway Co. v. Higgs, 38 Kan. 375, 16 Pac. 667; Spellman v. Transit Co. (Nebr.), 55 N. W. 270, 22 L. R. A. 316; McLean v. Burbank, 11 Minn. 277; Dahl v. Railway Co., 62 Wis. 655, 22 N. W. 755; Watkins v. El. Co. (Ala.), 24 So. 392, 43 L. R. A. 297.

general custom of street carriage of passengers.<sup>74</sup> If a street railway be built along a causeway which necessitated placing trolley poles near the track, and the plaintiff, who had knowledge of the situation, be riding on the footboard next to the trolley poles and refused to step upon the platform at the invitation of the conductor, but leaned back to allow him to pass by and thereby his head is brought in contact with a trolley pole, he is guilty of contributory negligence.<sup>75</sup> A passenger upon a cable street railway is not guilty of negligence in taking a seat provided for passengers upon the outside of the grip car instead of on the inside of the trailer.<sup>76</sup>

**§ 19. Paying fares.**—There is a distinction between railroads whose passengers may pay their fares at a ticket office and street surface railroads where they are obliged or permitted, customarily, to pay upon the cars. While the carrier may ordinarily exact just the amount of the fare in advance, nevertheless, since in a street car the passenger is ordinarily permitted to board without demanding the payment of his fare, the enforcement of a rule requiring the

74. West Chicago St. R. Co. v. Stiver, 69 Ill. App. 625; Lake v. Cincinnati Inc. P. R. Co., 13 Ohio C. C. 494; East Omaha St. R. Co. v. Godola, 50 Nebr. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas. (N. S.), 300; Cleveland, C., C. & St. L. Co. v. Moneyhun, 146 Ind. 147, 34 L. R. A. 141, 44 N. E. 1106, 5 Am. & Eng. R. Cas. (N. S.) 682.

75. Nugent v. Fair Haven & W. St. Ry. Co., 73 Conn. 139, 46 Atl. 875. And see Caspers v. D. D. & E. B. R. Co., 22 App. Div. (N. Y.) 156, 47 N. Y. Supp. 961; Vroman v. Houston, W. S. & P. Ferry R. Co., 7 Misc. Rep. (N. Y.) 234,

58 St. Rep. (N. Y.) 23, 27 N. Y. Supp. 257; Tanner v. Buffalo R. Co., 72 Hun (N. Y.), 465, 54 St. Rep. (N. Y.) 776, 25 N. Y. Supp. 242; Littmann v. D. D., etc., R. Co., 6 Misc. Rep. (N. Y.) 34, 55 St. Rep. (N. Y.) 514, 25 N. Y. Supp. 1002; Sweeney v. Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682; Pomaski v. Grant, 119 Mich. 675, 78 N. W. 891, 6 Det. Leg. N. 43; Malpass v. Hesstonville, M. & F. Pass. R. Co., 129 Pa. St. 599, 42 Atl. 291, 5 Am. Neg. Rep. 471.

76. Hawkins v. Front St. Cable Co., 3 Wash. 592, 28 Pac. 1021.

tender of the exact fare is impracticable and illegal.<sup>77</sup> The conductor is bound to furnish change for a reasonable sum;<sup>78</sup> and a regulation of the carrier requiring change to the amount of \$2 to be furnished by conductors on street cars to passengers is a reasonable provision for the convenience of the public; and the conductor cannot be required to furnish change for a \$5 bill.<sup>78</sup> The regulations of a street railroad company requiring that one taking passage on a car without the station should pay a fare, although a fare had already been paid in the station, is a reasonable one that should be observed by the passenger who may be ejected from the street car for refusal to pay the second fare.<sup>79</sup> A

77. Tarbell v. Central Pac. Ry. Co., 34 Cal. 616. One cannot recover for his ejection from a street car who, after having ridden a block and a half and, called upon to pay fare, then states that he has plenty of time to pay and will take a little time, and then upon the driver attempting to eject him, puts the driver out on the platform, and leaves the car, upon order, after the driver has armed himself to compel him to leave. Nye v. Marysville & Y. C. St. R. Co., 97 Cal. 461, 32 Pac. 530. The carrier is liable in damages to a passenger ejected from its car for refusal to pay a second fare to its driver after depositing a fare in the fare-box in accordance with the rule posted in the car which forbids payment to the driver, although it has given private directions to the driver to go through the cars when crowded and collect the fares. Perry v. Pittsb. Union R. Co., 153 Pa. St. 236, 25 Atl. 772. And see Hudson v. Lynn & B. R. Co. (Mass.), 59 N. E. 647.

78. Barker v. Central Park, N. & E. River R. Co., 151 N. Y. 237, 35 L. R. A. 489, 45 N. E. 550; Barrett v. Market St. R. Co., 81 Cal. 296, 6 L. R. A. 236; Muldowen v. Pittsb. & B. Tract. Co., 8 Pa. Super. Ct. 335, 29 Pittsb. L. J. (N. S.) 158, 43 W. N. C. 52; 17 U. C. Q. B. 428. In the Barrett Case, *supra*, the tender of a \$5-gold-piece was held sufficient.

79. Nashville St. Ry. Co. v. Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451. Plaintiff had paid his fare in the station, and seeing the car he wished to take standing just outside, ran for it and boarded it. The conductor immediately demanded fare after starting the car, and ejected plaintiff in such manner as to injure him. It was held also that it was error to charge that the starting of the car on its journey with knowledge that plaintiff had paid a fare was an acceptance of him as a passenger and a waiver of the rule as to him.

parent refusing to pay the fare of his child, who is subject to payment of fare, even though he tender payment of his own fare, may, with the child, be expelled from the car.<sup>80</sup> If a coin be tendered which the conductor deems counterfeit, but which is in fact genuine, and the passenger unreasonably refuses to pay his fare with other money and is ejected, it is proper to submit to the jury, on the question of the injury to his feelings for the ejection, whether his conduct tended to provoke trouble unnecessarily.<sup>81</sup> A passenger who boards an open street car and after paying his fare therein changes, for his own convenience, to a closed car which is attached to the open car, may properly be ejected if he refuse to pay fare to the conductor of the closed car.<sup>82</sup> But, ordinarily, a railroad conductor is chargeable with knowledge that a passenger has delivered valid tickets to an assistant conductor aid-

80. Braun v. Northern Pac. Ry. Co., 79 Minn. 404, 49 L. R. A. 319, 82 N. W. 675. And it has been held that the demand of the regular fare from passengers by a conductor is not improper, although another conductor on the same train had previously accepted less fare. Cox v. Los Angeles Terminal R. Co., 109 Cal. 100, 41 Pac. 794; Warfield v. Louisville & N. R. Co. (Tenn.), 55 S. W. 304. If passenger ejected to platform for refusal to pay child's fare, conductor need not accept fare then tendered but may put him off. Behr v. Erie R. Co., 69 App. Div. (N. Y.) 416.

81. Bassau v. Mad. El. Ry. Co., 106 Wis. 301, 82 N. W. 152. In the case cited it appeared that the plaintiff, accompanied by a lady,

tendered genuine coin which the conductor deemed counterfeit, and on his refusal to pay with other money the conductor took him by the collar, and said: "Come along, you have got to leave this car;" thereupon he and his lady companion left it peaceably. The conductor spoke harshly and so loudly as to be heard by others in the car when it was in motion. Held, that the ejection was not under such insulting and cruel circumstances as to warrant the submission of the question of punitive damages to the jury.

82. Lasker v. Third Ave. R. Co., 27 Misc. Rep. (N. Y.) 824, 57 N. Y. Supp. 395. And see Cherry v. Kansas City, etc. R. Co., 52 Mo. App. 499.

ing him in collecting tickets; and the passenger need not pay fare wrongfully demanded of him and sue for its return, instead of submitting to ejection and bringing an action for the tort.<sup>83</sup> The constitutional declaration that railways are public highways does not make them such in the sense that persons are authorized to ride on railway cars without consent of the company or payment of fares.<sup>84</sup> A passenger may avail himself of the benefit of a contract by a town with a street railway company limiting the rate of fare.<sup>85</sup> That a traveler is being carried gratuitously or has not paid his fare will not of itself deprive him of the right of action for the result of the carrier's negligence.<sup>86</sup> A genuine silver coin is legal tender for car fare, although it is worn smooth; and a refusal to make any other payment will not prevent the passenger from maintaining an action for damages for his ejection if the coin is not appreciably diminished in weight and is distinguishable.<sup>87</sup>

**§ 20. Alighting.**—A common carrier of passengers is required to do all that human care, vigilance, and foresight can reasonably do, consistent with the mode of conveyance

83. *Cherry Case, supra*; *Toomey v. D. L. & W. R. Co.*, 24 N. Y. Supp. 108, 53 St. Rep. (N. Y.) 567.

84. *Farber v. Mo. P. R. Co.*, 16 Mo. 81, 20 L. R. A. 350, 22 S. W. 631.

85. *Adams v. Union R. Co.*, 21 R. I. (Part 1) 137, *id.* 134, 44 L. R. A. 273, 42 Atl. 515.

86. *Russell v. Pittsb., C., C. & St. L. Ry. Co. (Ind.)*, 61 N. E. 678; *Louisville, N. A. & C. R. Co. v. Taylor*, 126 Ind. 126, 25 N. E. 869, 25 Ohio L. J. 55; *Gulf C. & S. F. R. Co. v. Wilson*, 79 Tex. 371,

11 L. R. A. 486, 15 S. W. 280; *Cogswell v. West S. & M. E. El. R. Co.*, 5 Wash. 46, 52 Am. & Eng. R. Cas. 500, 7 Am. R. & Corp. Rep. 48, 31 Pac. 411; *Florida S. R. Co. v. Hirst*, 30 Fla. 1, 16 L. R. A. 631, 12 Ry. & Corp. L. J. 218, 11 So. 506, 52 Am. & Eng. R. Cas. 409.

87. *Morgan v. Jersey City & B. R. Co.*, 52 N. J. L. 60, 18 Atl. 904. And see *Atlanta Consol. St. R. Co. v. Keeny*, 99 Ga. 266, 33 L. R. A. 824, 25 S. E. 629, 5 Am. & Eng. R. Cas. (N. S.) 305.

and the practicable prosecution of its business, to prevent accident to passengers alighting from its cars.<sup>88</sup> It is the duty of the person in charge of the power, when signaled, to stop his car at a usual and customary station for stopping a sufficient length of time to give the passenger a reasonable opportunity to alight in safety; and it is the reciprocal duty of the passenger to use reasonable diligence in getting off.<sup>89</sup> The passenger may assume that he will have a reasonable time to alight; and if he be injured in alighting the jury may infer that the time was insufficient.<sup>90</sup> It must be remembered

88. Washington & G. R. Co. v. Grant, 11 App. D. C. 107, 25 Wash. L. Rep. 342; Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 38 N. E. 578; Grace v. St. Louis R. Co., 156 Mo. 295, 56 S. W. 1121; Asbury v. Charlotte Ry., L & P. Co., 125 N. C. 568, 34 S. E. 654.

89. Paducah St. Ry. Co. v. Walsh, 22 Ky. L. Rep. 532, 58 S. W. 431; Weiss v. Met. St. Ry. Co., 29 Misc. Rep. (N. Y.) 332, 60 N. Y. Supp. 473; West Chicago St. R. Co. v. Waniata, 68 Ill. App. 481; affd., 169 Ill. 17, 48 N. E. 437; Conway v. New Orleans & C. R. Co., 46 La. Ann. 1429, 16 So. 362; Murphy v. Met. St. Ry. Co., 19 Misc. Rep. (N. Y.) 194, 43 N. Y. Supp. 223; Poulin v. Broadway & Seventh Ave. R. Co., 61 N. Y. 621, affg. 34 N. Y. Super. Ct. (2 J. & S.) 296.

90. Cullar v. Mo., K. & T. Ry. Co., 84 Mo. App. 340; Belt El. L. Co. v. Tomlin, 19 Ky. L. Rep. 433, 40 S. W. 925; Met. R. Co. v. Jones (D. C. App.), 21 Wash. L. Rep. 646, 1 App. D. C. 200; Britton v. Grand Rapids St. R. Co., 90 Mich. 159, 51 N. W. 276; N.

Chicago St. R. Co. v. Brown, 178 Ill. 187, 52 N. E. 864, affg. 76 Ill. App. 654. It has been held that the one in charge of the street car has a duty to *know* that no passenger is in the act of alighting or in a dangerous position before putting the car in motion again; that stopping a reasonable time to allow passengers to alight is not sufficient. Anderson v. Citizens' St. R. Co. (Ind. App.), 38 N. E. 1109. But the better rule is that the carrier is not liable for an accident to a passenger received in attempting to alight from the car after it had started, where it has stopped a reasonable time for passengers to get off, and all intending to get off have apparently done so, and the conductor is not aware of the passenger's intention to leave. Gilbert v. West End St. R. Co., 160 Mass. 403, 36 N. E. 60; Losee v. Watervliet Tp. & R. Co., 63 Hun (N. Y.), 404. The conductor however must be alert to see that no one is alighting or attempting to alight before he starts his car. His absorption in other duties will aggravate rather than

that the duty resting upon the carrier is to deliver its passenger safely, and that involves the duty of observing whether he has actually alighted before the car is started again. If the conductor fails to attend to this duty and does not give the passenger time enough to get off before the car starts, it is necessarily this neglect of duty which is the primary cause of the accident, if injury be occasioned thereby to the passenger. It is not a duty due to a person solely because he is in danger of being hurt, but a duty owed to a person whom the carrier had undertaken to deliver and who was entitled to be delivered safely by being allowed to alight without danger.<sup>91</sup> But the carrier is under no duty to assist the

excuse the charge of the carrier's negligence in starting while the passenger is attempting to alight. *Met. R. Co. v. Jones, supra.* And see *Muihado v. Brooklyn City R. Co.*, 30 N. Y. 370; *Schiller v. D. D., etc., R. Co.*, 26 Misc. Rep. (N. Y.) 392, 56 N. Y. Supp. 184.

91. *Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 583, 37 L. Ed. 284, 289, 21 Wash. L. Rep. 231, 13 Sup. Ct. Rep. 557; *Birmingham, R. & E. Co. v. Weldman*, 119 Ala. 547, 24 So. 548; *Leavenworth El. Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519, 6 Am. Neg. Rep. 282; *Louisville R. Co. v. Rammacker*, 21 Ky. L. Rep. 250, 51 S. W. 175; *Cobb v. Lindell R. Co.*, 149 Mo. 135, 50 S. W. 310; *Flanagan v. Met. St. Ry. Co.*, 31 Misc. Rep. (N. Y.) 820, 64 N. Y. Supp. 379; *Grace v. St. Louis R. Co.*, 156 Mo. 295, 56 S. W. 1121; *Fenig v. New Jersey St. Ry. Co. (N. J.)*, 46 Atl. 602; *Morrison v. Charlotte El. Ry., L. & P. Co.*, 123 N. C. 414, 31 S. E. 720; Spring-

field Consol. R. Co. v. Hoeffner, 17j Ill. 634, 51 N. E. 884, affg. 71 Ill. App. 162; *West Chicago St. R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958, 9 Am. & Eng. R. Cas. (N. S.) 364, affg. 70 Ill. App. 239; *Nichols v. Lynn & B. R. Co.*, 168 Mass. 528, 47 N. E. 427.

Notice to conductor or gripman on the car from the conduct of a passenger in his immediate presence and sight that such passenger wished to alight as soon as the car came to the stop which he had signaled is the equivalent of express warning or notification by the passenger so as to render the company liable for the sudden starting of the car while he was endeavoring to alight. *West Chicago St. R. Co. v. Stiver*, 69 Ill. App. 625.

Plaintiff, weighing 300 pounds, injured in alighting from defendant's car, testified that he was sitting with one side of his hip on the seat, his foot on the running board about to step down, when

passenger in alighting.<sup>92</sup> If, however, the car be started suddenly so as to produce a jerking motion while the passenger is alighting, it is in itself an act of negligence; but the question whether a reasonable opportunity to alight had been given is generally one of fact, as there is no fixed measure of care which can be declared by the court as a matter of law.<sup>93</sup> The fact that a street car stops at the nearer cross-walk of a crossing will authorize a person to assume that such stop was made to enable him to leave the car at the

he was thrown "out and forward" by a sudden forward jerk of the car which had come nearly to a standstill for him to alight. Held, that the jury were not bound to find whether he was thrown off forward or backward. *Guntzer v. Yonkers Ry. Co.*, 51 App. Div. (N. Y.) 222, 64 N. Y. Supp. 857.

92. *Deming v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. App. 152, 2 Mo. App. Rep. 547; *Selby v. Detroit Ry.* (Mich.), 81 N. W. 106.

93. *Brady v. Met. St. Ry. Co.*, 33 Misc. Rep. (N. Y.) 793, 67 N. Y. Supp. 588; *Root v. Des Moines City Ry. Co.* (Ia.), 83 N. W. 905. In the case last cited it was claimed by plaintiff that while stepping to the ground from the car, the car started with a jerk and she was injured. The conductor testified that he did not see the plaintiff nod as a signal to stop, and did not commence to decrease the speed of his car till he had passed the crossing, and then only to keep from frightening a horse, and that the speed was not reduced to less than three miles an hour, and was increased without a jerk after it had passed the horse. He was corroborated as to the speed of the

car by a third person, who also testified that the plaintiff alighted before the speed was increased, and had made contradictory statements out of court. The plaintiff knew that the car had passed the crossing and that it only stopped at crossings. Held a question for the jury. And see *Machen v. Pittsb. & W. E. Pass. Ry. Co.*, 13 Pa. Super. Ct. 642; *Willis v. Met. St. Ry. Co.*, 63 App. Div. (N. Y.) 332, 71 N. Y. Supp. 554; *Cooper v. Ga., C. & N. Ry. Co.*, 61 S. C. 345, 39 S. E. 543; *Colt v. Sixth Ave. R. Co.*, 33 N. Y. Super. Ct. (1 J. & S.) 189; affd., 49 N. Y. 671; *Monroe v. Third Ave. R. Co.*, 50 N. Y. Super. Ct. (18 J. & S.) 114; *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131, affg., 10 Bosw. (N. Y.) 260; *Harris v. Union Ry. Co.*, 69 App. Div. (N. Y.) 385. In the case last cited it appeared that the passenger motioned to conductor who was on rear platform, and the latter raised his hand to the bell-rope, and passenger, without hearing the bell, stepped down on side-step of car, and when it had slowed down, while in the act of alighting it started forward suddenly and he was injured. Held for jury.

nearest walk, although a city ordinance directs the stop to be made at the farther walk of a street intersection. It is the duty of the conductor when stopping at the nearer walk because of an obstruction or other cause, to warn the passengers not to alight there.<sup>94</sup> It is also his duty when a lady passenger is alighting to see that she has time, not only to step off, but to clear her skirts, and that they do not catch on any appliance on the platform.<sup>95</sup> A passenger on an electric car is not necessarily negligent in taking, with ordinary care, a position on the steps of the car preparatory to alighting, or in attempting to alight while the car is moving so slowly that it would not appear to a man of ordinary prudence to be dangerous.<sup>96</sup> The question of his negligence

94. West Chicago St. R. Co. v. Manning, 170 Ill. 417, 48 N. E. 958, 9 Am. & Eng. R. Cas. (N. S.) 364, affg. 70 Ill. App. 239.

95. Smith v. Kingston City R. Co., 55 App. Div. (N. Y.) 143, 67 N. Y. Supp. 185; affd., 169 N. Y. —. In the case cited it was also held that it cannot be declared to be negligent, as matter of law, for a lady to wear a dress so long that it would be likely to catch upon an appliance of a street car, like a plunger. And see Colt v. Sixth Ave. R. Co., 33 N. Y. Super. Ct. 189; affd., 49 N. Y. 671; Citizens' St. Ry. Co. v. Shepard (Ind. App.), 59 N. E. 340; Kelley v. N. Y., etc., R. Co., 109 N. Y. 44, 15 N. E. 879; Chase v. Jamestown St. Ry. Co., 38 St. Rep. (N. Y.) 954, 15 N. Y. Supp. 35; affd., 133 N. Y. 619; Bowdle v. Detroit St. R. Co., 103 Mich. 272, 50 Am. St. Rep. 366, 40 Cent. L. J. 132, 61 N. W. 529. In Poulin v. Broadway & Seventh

Ave. R. Co., 61 N. Y. 621, affg. 34 N. Y. Super. Ct. (2 J. & S.) 296, it was held that the refusal to charge that a lady wearing a hoopskirt should exercise more care in alighting from a car than a man was proper.

In Doyle v. M. E. R. Co., 29 Misc. Rep. (N. Y.) 331, 60 N. Y. Supp. 475, it was held that because a lady passenger was dragged along after alighting from a street car, her skirt in some unexplained manner having been caught by some part of the car built in 1898, and of the most approved pattern, afforded in itself no proof that the carrier had been negligent.

96. Birmingham Ry. & E. Co. v. James, 121 Ala. 120, 25 So. 847; Watkins v. B. Ry. & E. Co., 120 Ala. 147, 43 L. R. A. 297, 24 So. 392; Sweeney v. Kansas City Cable Co., 150 Mo. 385, 51 S. W. 682; Scott v. Bergen County Tract. Co., 43 Atl. 1060, 4 Chic. L. J. Wkly. 379; Bowie v. Greenville St. R.

is always one for the jury.<sup>97</sup> A momentary stop of a car at a place at which passengers are not accustomed to alight for the purpose of taking a signal for crossing another track, or, in case of a cable car, to make the "let-go," is not an invitation to a passenger to get off at such a point; and the carrier is not negligent, unless the person in charge of the car knew that the passenger intended to alight or had reason to suspect it;<sup>98</sup> and this is true even although the passenger

Co., 69 Miss. 196; N. J. Tract. Co. v. Gardner, 60 N. J. L. 571, 38 Atl. 669, 9 Am. & Eng. R. Cas. (N. S.) 843; Jagger v. People's St. R. Co., 180 Pa. St. 436, 38 L. R. A. 786; North Chicago St. R. Co. v. Wiswell, 168 Ill. 613; Saiko v. St. Paul City R. Co., 67 Minn. 8; Schepers v. Union Depot R. Co., 5 Am. Electl. Cas. 399, 126 Mo. 665; Duncan v. Wyatt Park, etc., Co., 48 Mo. App. 659. The fact that the passenger attempted to step off the car while it was in motion will not prevent her recovery for injuries occasioned by a sudden start of the car so nearly simultaneous with her stepping off that she had no chance after the car started, but was obliged to step off to avoid falling. Piper v. Minneapolis St. R. Co., 52 Minn. 269, 53 N. W. 1060; Mitchell v. El. Tract. Co., 12 Pa. Super. Ct. 472.

97. Holmes v. Ashtabula R. T. Co., 10 O. C. D. 638; Kuhlman v. Met. St. R. Co., 29 Misc. Rep. (N. Y.) 773, 60 N. Y. Supp. 989; revd., 30 Misc. Rep. (N. Y.) 417, 62 N. Y. Supp. 466; Hutchins v. Macomber, 68 N. H. 473, 44 Atl. 602; Currie v. Mendenhall (Minn.), 79 N. W. 677; Coursey v. So. Ry. Co. (Ga.), 38 S. E. 866; Ober v. Crescent City

R. Co., 44 La. Ann. 1059, 52 Am. & Eng. R. Cas. 576, 11 So. 818. A passenger who, though acquainted with the line and with its dangers, and in spite of a warning notice conspicuously placed in the car, steps upon the footboard of a moving trolley car for the purpose of alighting, his body being outside the car, and is struck by a trolley post, and is injured, is guilty of contributory negligence, which bars recovery against the railway company. State v. Lake Roland El. Ry. Co. (Md. Ct. App.), 6 Am. Electl. Cas. 412.

98. Kohler v. West Side R. Co., 99 Wis. 33, 74 N. W. 568; Jackson v. Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192. Where plaintiff told the motorman to stop at a certain street, the latter did not notice his request, and while crossing the street plaintiff touched him and asked him why he did not stop the car, and thereupon the motorman immediately proceeded to slow up, and while doing so told plaintiff not to get off until the car stopped; nevertheless, plaintiff stepped off before it stopped and was injured; and it was held he was not entitled to recover. Campbell v. Los Angeles Ry. Co. (Cal.), 67 Pac. 50.

has signaled the conductor that he desires to alight.<sup>99</sup> A passenger on a street car has the right to expect that the street where she alights is in a safe condition; and if she alight without looking to see where she is stepping and is injured thereby, she is not necessarily negligent. It is the duty of the carrier to see to it that the place of alighting is safe.<sup>1</sup> If to improve the roadbed, the carrier excavate and leave open trenches in a public street, it owes the duty to those desiring to alight from street cars, as well as to others of the traveling public, to exercise reasonable care to guard

99. Armstrong v. Met. St. Ry. Co., 36 App. Div. (N. Y.) 525, 55 N. Y. Supp. 498, affd. 165 N. Y. 641, 59 N. E. 1118. The court in this case said: "The slackening of the speed of the car may be due to the exercise of reasonable care in the operation of the car with respect to pedestrians or vehicles; and, in the absence of knowledge that the conductor had signaled the gripman to stop and that he was in the act of doing so in response to the signal, the plaintiff would have no ground for assuming that a change in the speed of the car was intended for his benefit or convenience." (Page 527.) And see Nichols v. Sixth Ave. R. Co., 38 N. Y. 131; Dresslar v. Citizens' St. R. Co., 19 Ind. App. 383, 47 N. E. 651; Chicago City R. Co. v. Gregg, 69 Ill. App. 77.

1. Bass v. Concord St. Ry. (N. H.), 46 Atl. 1056. In the case cited the car was stopped a short distance beyond the regular place and opposite a hole in the highway into which the plaintiff fell while alighting and was injured. It was held that an instruction to the jury that if the conductor had no special in-

formation as to the condition of the place which the plaintiff did not have the means of seeing or of obtaining for herself, he was under no obligation to give her any information in regard to it, was properly refused. And see Stewart v. St. Paul City Ry. Co. (Minn.), 80 N. W. 854; Wells v. Steinway R. Co., 18 App. Div. (N. Y.) 180, 45 N. Y. Supp. 864; Vasele v. Grant St. El. R. Co., 16 Wash. 602, 48 Pac. 249, 9 Am. & Eng. R. Cas. (N. S.) 75; Cincinnati St. Ry. Co. v. Snell, 6 Am. Electl. Cas. 436, 54 Ohio St. 197. But failure of the conductor to stop his car exactly at a street crossing at which the passenger wishes to alight does not in itself constitute actionable negligence, even though the passenger is injured in leaving the car. Conway v. Lewiston & A. R. Co., 90 Me. 199, 38 Atl. 110; Foley v. Brunswick Tract. Co. (N. J.) 50 Atl. 340. In the cases cited, it appeared that the passenger stepped upon a loose stone in going from the car to the sidewalk. For "street crossing," see Schneider v. Market St. Ry. Co. (Cal.), 66 Pac. 734.

the trench and give notice or warning of the danger.<sup>2</sup> As a general rule, a passenger on alighting from a car on a track parallel with the one on which the car is running is bound before crossing the track to observe carefully for the approach of a car on the parallel track, and his omission to take any precaution is not justified by the failure of the motorman on the approaching car to ring the bell or give any signal of his approach.<sup>3</sup> When a youth or a child is

2. Wolfe v. Third Ave. R. Co., 67 App. Div. (N. Y.) 605; Blake v. Ferris, 5 N. Y. 48. In the case first cited, an action based on injuries occasioned to a passenger on alighting from a car into an open trench, it appeared that the defendant did not call the conductor or motorman, or account for their absence. The court held that under these circumstances the jury were warranted in finding negligence on the part of the railroad company either for stopping the car opposite the open trench and by implication inviting plaintiff to alight therefrom without notice or warning, or for not properly guarding the trench which it had caused to be excavated in a public street for its own benefit (p. 609), citing Maverick v. Eighth Ave. R. Co., 36 N. Y. 378; Storrs v. Utica, 17 id. 104; Pettingill v. Yonkers, 116 id. 558; Deming v. Terminal Ry. of Buffalo, 169 id. 1.

In a recent case it appeared that the car did not stop at a certain street where the conductor had been notified a passenger desired to alight, at which there was a plank roadway guarded by rails and at which the cars usually stopped; it was night and the car passed on

to a place where there was no protection and where the track passed over a trestle; the conductor, knowing where the passenger was going, pointed to the place, and the latter, thinking it the usual stopping place, alighted and fell through the trestle. Held, the company was guilty of negligence in carrying the passenger past his destination and leaving him at the dangerous place. Henry v. Grant St. El. Ry. Co. (Wash.), 64 Pac. 137. And see Flack v. Nassau El. R. Co., 41 App. Div. (N. Y.) 399, 58 N. Y. Supp. 839; Maverick v. Eighth Ave. R. Co., 36 N. Y. 378; Langin v. N. Y. & B. Bridge, 10 App. Div. (N. Y.) 529, 42 N. Y. Supp. 353.

3. Johnson v. Third Ave. R. Co., 69 App. Div. (N. Y.) 247. Where however the passenger alights and passes around the rear of the car, understanding that the rule of the company requires that a moving car on the parallel track should slacken its speed on approaching a car stopping to allow passengers to alight, he may recover for an injury occasioned to him by the failure of the approaching car to observe the rule. Dobert v. Troy City Ry. Co., 91 Hun (N. Y.), 28, 71 St. Rep. (N. Y.) 392, 36 N. Y.

directed to jump off the car by the conductor, who refuses on request to stop,<sup>4</sup> or when frightened with a blow from the driver's whip,<sup>5</sup> his negligence is a question for the jury to be determined on properly considering the age, experience, and understanding of the person.<sup>6</sup>

**§ 21. Trespassers; and newsboys.**—A street car company owes a trespasser no duty of protection. Its servants have the right to remove him from the car, but in so doing they are required to subject him to no unnecessary hazard. They have no right to seize him and throw him from the car while it is in motion, or to so violently assault or frighten him as to cause him to fall from the car. Any act of its servants which is improper, unnecessarily dangerous, and the proximate cause of the injury, and done for the purpose of removing the trespasser from the car, may justify a recovery of damages against the company for the injury.<sup>7</sup> If the employee use more force than is necessary, no matter whether he thinks he is using excessive force or not, the company is liable.<sup>8</sup> It is the duty of such carriers to prevent children

Supp. 105, distinguishing Burke v. N. Y. C., etc., Co., 73 Hun (N. Y.), 35; Tucker v. same, 124 N. Y. 308. And see Fielder v. New Jersey St. Ry. Co. (N. J. Sup.), 50 Atl. 533.

4. Wyatt v. Citizens' Ry. Co., 55 Mo. 485; Lovett v. Salem & S. D. R. Co., 9 Allen (Mass.), 557.

5. Mettlestadt v. Ninth Ave. R. Co., 4 Robt. (N. Y.) 377.

6. Washington, A. & Mt. V. El. R. Co. v. Quayle, 95 Va. 741, 30 S. E. 391.

7. Ansteth v. B. R. Co., 145 N. Y. 210, 214, 39 N. E. 708, 64 St. Rep. (N. Y.) 598; Nussbaum v. Louisville Ry. Co. (Ky.), 57 S. W.

249; Jackson v. St. Louis S. W. Ry. Co., 52 La. Ann. 1706, 28 So. 241; N. Chicago St. R. Co. v. Olds, 165 Ill. 472, affg. 64 Ill. App. 595, 1 Chic. L. J. Week. 356; Day v. Brooklyn City R. Co., 12 Hun (N. Y.), 435; McCann v. Sixth Ave. R. Co., 117 N. Y. 505; Murphy v. Central Park, etc., R. Co., 48 N. Y. Super. Ct. 96; N. Chicago City R. Co. v. Gastka, 128 Ill. 613; Hestonville, etc., Ry. Co. v. Biddle, 16 Atl. 488. And see same adv. same, 112 Pa. St. 551, 4 Atl. 385.

8. Citizens' St. R. Co. v. Willoeby, 134 Ind. 563, 58 Am. & Eng. R. Cas. 485, 33 N. E. 627; Lake

from entering their cars except under proper safeguards.<sup>9</sup> But this duty is not an absolute one; it depends upon the circumstances; for example, the company is not liable for the death of a boy seventeen years old, of ordinary intelligence, experience, and judgment, from being run over by a car while running and jumping off the front platform, without permission, for the purpose of whipping the mules drawing the car, although his father had previously told the driver to keep him off the car.<sup>10</sup> It is not liable for an injury to a boy eleven years old, who, for the purpose of stealing a ride, boards the car and secretes himself so as to avoid detection, unless his presence is actually known and assented to by the driver or conductor; and such assent cannot be implied by the mere fact that the driver observed him and did not demand any fare, where it was the duty of the conductor and not the driver to collect fares.<sup>11</sup> It is not chargeable with negligence if a person, without the knowledge of the employees in charge of the car, boards it at a place other than a proper stopping place, while the car is in motion, and on discovering him the employees immediately attempt to stop the car to prevent injury by using the care required by law.<sup>12</sup> Operating small cars by a dummy engine, in a street, at a low rate of speed, with occasional stops, without directions to prevent children getting upon them, does not

Erie & W. R. Co. v. Matthews, 13 Ind. App. 355, 41 N. E. 842; Baber v. Broadway & S. A. R. Co., 10 Misc. Rep. (N. Y.) 109, 62 St. Rep. (N. Y.) 466, 30 N. Y. Supp. 931.

9. N. J. Tract. Co. v. Danbech, 57 N. J. L. (28 Vroom) 463, 31 Atl. 1038.

10. Taylor v. South Covington & C. St. R. Co., 14 Ky. L. Rep. 355, 20 S. W. 275. And see Wrasse v.

Citizens' Tract. Co., 146 Pa. St. 417, 1 Pa. Adv. Rep. 125, 23 Atl. 345, 29 W. N. C. 288, 22 Pittsb. L. J. (N. S.) 258.

11. Wynn v. Havana City & S. R. Co., 91 Ga. 344, 17 S. E. 649. And see Atchison, T. & S. F. R. Co. v. Headland, 18 Colo. 477, 58 Am. & Eng. R. Cas. 4, 33 Pac. 185.

12. Citizens' St. Ry. Co. v. Merl, 59 N. E. 491.

create a liability for the death of a child boarding the cars and being thrown or falling therefrom.<sup>13</sup> But it is negligence upon the part of the carrier to allow a young child trespassing upon a car to ride upon the steps of the front or rear platform, when his dangerous position is actually known, or the circumstances are such as would make failure to know his peril palpable neglect and inattention to duty on the part of those in charge of the car.<sup>14</sup> The company is not liable for injuries sustained by a boy while getting upon a car by invitation of the motorman or conductor to ride in payment for his services in opening a switch for the latter, contrary to the company's rules and instructions not to allow others than passengers to ride.<sup>15</sup> But it is negligent if its motorman permit a boy to play on the car and jump therefrom while it is in motion.<sup>16</sup> If the employees upon the car had no reasonable opportunity to prevent the boy from jumping off the platform of one car upon the opposite track, where he was run over and killed, a recovery cannot be had against the company.<sup>17</sup> So, too, there is no liability where a boy eight years old steps off the front platform on which he was standing without the knowledge of the conductor, while the interior of the car as well as both platforms were crowded, and thus sustains injury.<sup>18</sup> Newsboys enter-

13. *Jefferson v. Birmingham Ry. & E. Co.*, 116 Ala. 294, 22 So. 546, 36 L. R. A. 458. And see *Feingold v. Phila. Tract. Co.*, 7 Pa. Dist. 445, 21 Pa. Co. Ct. 183, 4 Lack. Leg. N. 290; *Pope v. United Tract. Co. (Pa. C. P.)*, 30 Pittsb. L. J. (N. S.) 62; *Little Rock Tract. & E. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7.

14. *Wynn v. Havana City & S. R. Co.*, 91 Ga. 344, 17 S. E. 649;

*Jackson v. St. Paul City R. Co.*, 74 Minn. 48, 5 Am. Neg. Rep. 47, 76 N. W. 956.

15. *Finlay v. Hudson El. R. Co.*, 64 Hun (N. Y.), 373, 19 N. Y. Supp. 621, 46 St. Rep. (N. Y.) 202.

16. *Pueblo El. St. R. Co. v. Sherman*, 25 Colo. 114, 53 Pac. 322.

17. *Hogan v. Central Park, N. & E. River R. Co.*, 124 N. Y. 647, 36 St. Rep. (N. Y.) 352, 26 N. E. 950.

18. *Sandford v. Hestonville, etc.*,

ing street cars for the purpose of selling papers assume all the risks of ordinary negligence on the part of the company's servants; they are not passengers and may be compelled to leave the car to facilitate the admission of passengers;<sup>19</sup> and the company is not liable for the act of a motorman, having no control over or authority to interfere with passengers or persons on the car, in pushing a newsboy off the car, who was getting on to sell a paper to a passenger.<sup>20</sup>

**§ 22. Damages for failure to carry passenger.**—If by reason of accident to the car or the refusal of the conductor to accept a proper transfer ticket, or from any other cause for which the carrier may be held liable, injury has been sustained by the passenger, he must find his redress in damages for the breach of its contract with him. He has no right to insist upon riding without paying another fare, and if ejected, to bring his action against the company for the wrongful assault. As was stated by the New York Court of Appeals in an action to recover for a wrongful ejection because the conductor in charge of the train refused to accept the ticket offered, the passenger then knows that he cannot proceed upon the ticket taken, but must resort to his remedy the same as though he had been ejected. If, after this notice, he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to effect the object, he can neither recover against the conductor or the company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort

Co., 136 Pa. St. 84, 20 Atl. 799, 26  
W. N. C. 401, 48 Phila. Leg. Int.  
67.

19. Phila. Tract. Co. v. Orbann,  
119 Pa. St. 37.  
20. Coll v. Toronto R. Co.  
(Can.), 25 Ont. App. 55.

to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case. This rule will prevent breaches of the peace instead of producing them; it will leave the company responsible for the wrong done by its servant without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery, caused by the faithful efforts of its servants to enforce its lawful regulations.<sup>21</sup> In an action against the carrier to recover damages for failure to carry plaintiff within the appointed time to the place for which he had taken passage, by reason whereof he did not perform his errand there and was detained at expense and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, or that he could not with due effort accomplish his errand by reason of his delay in arriving. He cannot recover his expenses and the damages to his business during a sojourn of several days without some proof as to the time when he first ascertained that he could not accomplish his errand and might thereafter return.<sup>22</sup>

**§ 23. Assault, etc., upon passenger by employee.**—A common carrier is liable to any one sustaining the relation of passenger to it for an injury resulting from any act of its servants or employees, whether willful and malicious or not, and even though such act is not done in the course or within the scope of the servants' or agents' employment; the rule that the master is not liable for injury resulting from the

21. *Townsend v. N. Y. C., etc.*, *Dillon v. Lindell R. Co.*, 71 Mo. R. Co., 56 N. Y. 295, 301; *Taylor v. Nassau El. R. Co.*, 32 App. Div. (N. Y.) 486, 53 N. Y. Supp. 5; *Benson v. N. J. R. & T. Co.*, App. 631. 22. *N. Y. Super. Ct.* (9 Bosw.) 412.

willful and malicious acts of his agents, not done within the scope of their employment, is not applicable when the injury is inflicted upon a passenger by the carrier's agent or servant.<sup>23</sup> It is the duty of the carrier, not only to convey the passengers safely and expeditiously between the termini of the route expressed in the contract, but also to conserve, by every reasonable means, his convenience, comfort, and peace throughout the journey and protect him from insult, indignities, and personal violence.<sup>23</sup> So, an unjustifiable assault upon a passenger by a railroad employee, who owes him the duty of protection, renders the carrier responsible for the injuries caused thereby;<sup>24</sup> and it matters not that the act of the employee was malicious and wanton if done in the course

23. Birmingham Ry. & El. R. Co. v. Baird (Ala.), 30 So. 456. And see Central of Ga. Ry. Co. v. Brown (Ga.), 38 S. E. 989; Hart v. Met. St. Ry. Co., 34 Misc. Rep. (N. Y.) 521, 69 N. Y. Supp. 906; Hanson v. Urbana & C. El. St. Ry. Co., 75 Ill. App. 474; Knoxville Tract. Co. v. Lane, 103 Tenn. 376, 53 S. W. 557; Rose v. Railroad Co., 106 N. C. 170, 11 S. E. 526; Lafitte v. Railroad Co. (La.), 8 So. 701; Goddard v. Railway Co., 57 Me. 202; Craker v. Railway Co., 36 Wis. 657; Texas & P. Ry. Co. v. Tott, 20 Tex. Civ. App. 335; Masterson v. Railway Co., 102 Wis. 571. In the case of Hanson v. Urbana & C. El. St. Ry. Co., *supra*, it was held that the company was not liable for an assault committed by a motorman upon a passenger after he alighted from the car.

In a recent case in New York it was held that where the complaint in an action for assault by the carrier's employee alleged that the

plaintiff was willfully and maliciously insulted, assaulted, beaten, and bruised by defendant's street railway company while a passenger on its line, but did not allege negligence on the part of defendant or a failure to perform its contract, the cause of action was one for assault and battery and not within the jurisdiction of the municipal court under the Greater New York charter, section 1364 thereof providing that such court shall not have jurisdiction of an action for damages for assault and battery. Fister v. Met. St. Ry. Co., 30 Misc. Rep. (N. Y.) 430, 62 N. Y. Supp. 467.

24. Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 29 L. R. A. 465, 2 Am. & Eng. R. Cas. (N. S.) 418, 41 Pac. 952; Franklin v. Third Ave. R. Co., 52 App. Div. (N. Y.) 512, 65 N. Y. Supp. (99 St. Rep.) 434; Stewart v. Brooklyn & Cross-town R. Co., 90 N. Y. 588.

of the discharge of his duties to the master, which relate to the passenger.<sup>25</sup> If it be shown that the act was previously authorized or subsequently ratified by the master, or that the latter participated in the wrong, it may be chargeable

25. Eads v. Met. R. Co., 43 Mo. App. 536; Fordyce v. Beecher (Tex. Civ. App.), 21 S. W. 179; Tanger v. S. W. Mo. El. Ry. Co., 85 Mo. App. 28; Lexington Ry. Co. v. Cozine (Ky.), 64 S. W. 848; Lyons v. Broadway & Seventh Ave. R. Co., 32 St. Rep. (N. Y.) 232, 10 N. Y. Supp. 237. In a recent case in New York it appeared that the death of plaintiff's intestate, a boy fourteen years old, resulted from injuries from being run over by defendant's street car. He was riding on the front platform of one of defendant's cars, was kicked from the car by the motorman and fell upon his back; he arose, turned and walked slowly and lamely across the other track, when he was struck by another of the defendant's cars which came up without warning, at a very high rate of speed. It was held that it was error for the court to dismiss the complaint upon the ground that there was no evidence tending to show that the boy looked or listened before he attempted to cross the track, as it might very well be that the brutal treatment which the boy received from the motorman of the car rendered him unable for the moment to exercise his faculties with normal acuteness, and that under the influence of the impaired condition thus wrongfully created by the defendant he could neither appreciate nor avoid the impending danger. Pinder v. Brooklyn H. R.

Co., 65 App. Div. (N. Y.) 521. It was also held that if he were blameless in stepping in front of the second car the jury might properly determine that the act of the motorman in kicking him off the first car was negligence imputable to the defendant, wholly independent of any question of negligence in the operation of the second car. *Id.* And see Central of Ga. Ry. Co. v. Brown (Ga.), 38 S. E. 989. In a recent case it was also held that where the carrier, after knowledge of the servant's wanton assault upon a passenger, retains him in employment, the act is thereby ratified and the carrier is liable to punitive damages. Tanger v. S. W. Mo. El. Ry. Co., 85 Mo. App. 28. A rule which should make the carrier liable when the act resulting in the injury was carelessly, but unintentionally done, and exonerate him when the injury was the result of the intentional act of the servant, would lead to most absurd results. By such a rule a stage company who should place a lady passenger under the protection of its driver, to be carried over its road, would be liable if by his unskillful driving he upset the coach and injured her; but if, taking advantage of his opportunity, he should assault and rob her, the carrier would go scot free. If the porter of a sleeping car, employed to guard the car while the passengers sleep, should

with punitive damages, and not otherwise.<sup>26</sup> But the act of the employee complained of must be within the line of

himself fall asleep, or, abandoning his post, allow a pickpocket to enter and rob the passengers, the company would be liable; but, if the guardian should himself turn pickpocket and rifle the pockets of the passengers, the company would not be responsible for his acts.' The carrier selects his own servants and agents, and, we think, he must be held to warrant that they are trustworthy as well as skillful and competent. *Stewart v. Brooklyn & Crosstown R. Co.*, 90 N. Y. 588; *Nowack v. Met. St. Ry. Co.*, 166 id. 433, 440; *Palmeri v. Manhattan Ry. Co.*, 133 id. 261; *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 86, 87.

26. *Wright v. Glens Falls, S. H. & Fort E. St. R. Co.*, 24 App. Div. (N. Y.) 617, 48 N. Y. Supp. 1026; *Lake Shore, etc., Ry. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *Cleghorn v. N. Y. C., etc., R. Co.*, 56 N. Y. 44, 48; *Hagan v. Providence, etc., R. Co.*, 3 R. I. 81, 62 Am. Dec. 377; *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Sullivan v. Oregon, etc., R. Co.*, 12 Oreg. 392, 53 Am. Rep. 364, 21 Am. & Eng. R. Cas. 391; *Hayes v. Houston, etc., R. Co.*, 46 Tex. 272. In the Lake Shore case cited, the court said: "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal therefore, though of course

liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*, 16 U. S. (3 Wheat.) 546, 4 L. Ed. 456."

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"No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of the agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation." *Id.*, p. 111, 37 L. Ed. 102, citing *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. (21 How.) 202, 210, 16 L. Ed. 73, 75; *Milwaukee & St. Paul R. Co. v. Arms*, 91 U. S. 489, 493, 495, 23 L. Ed. 374, 376; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 609, 610, 30 L. Ed. 1146, 1148; *Caldwell v. New Jersey S. P. Co.*, 47 N. Y. 282; *Bell v. Midland R. Co.*, 10 C. B. (N. S.) 287, 4 L. T. (N. S.) 293. It was also held in the Lake Shore Case cited, that the passenger (plaintiff complaining of an unlawful arrest procured by the conductor of the defendant, who otherwise maliciously treated and insulted him for the purpose of humiliating and disgracing him before his fellow passengers) was entitled to full compensation, including any additional suffering in

his employment; for illustration, if he accidentally strike a passenger while making a playful attempt to strike another employee, the carrier is not liable.<sup>27</sup> A statute of New York

body or mind caused by the wantonness or mischief on the part of the conductor. And see *Craker v. Chicago*, etc., R. Co., 36 Wis. 659; *Ricketts v. Chesapeake*, etc., R. Co., 33 W. Va. 423, 25 Am. St. Rep. 901; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753; *Milwaukee*, etc., R. Co. v. *Finney*, 10 Wis. 388.

In a case in Maine, the court said: "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity as carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants, and it has no hands with which to act but the hands of its servants. All of its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and hands; and these minds and hands are its servants' minds and hands." *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39. And see also *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 4 Am. Rep. 229; *Jeffersonville R. Co. v.*

*Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Atl.*, etc., R. Co. v. *Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Palmer v. Charlotte*, etc., Co., 3 S. C. 580; *Kansas City*, etc., R. Co. v. *Sanders*, 98 Ala. 293, 13 So. 57; *Galena v. Hot Springs R. Co.*, 4 McCrary (U. S.), 371; *Gorman v. So. Pacific R. Co.*, 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157; *Atl.*, etc., R. Co. v. *Condor*, 75 Ga. 51; *Lake Erie*, etc., R. Co. v. *Christison*, 39 Ill. App. 495; *Louisville*, etc., R. Co. v. *Wolfe*, 128 Ind. 347, 25 Am. St. Rep. 436; *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 532; *Phila.*, etc., R. Co. v. *Larkin*, 47 Md. 155, 28 Am. Rep. 442; *Forsee v. Ala.*, G. S. R. Co., 63 Miss. 67, 56 Am. Rep. 801; *Louisville*, etc., R. Co. v. *Fleming*, 14 Lea (Tenn.), 128. A street car conductor who forcibly ejects a passenger from a car under the honest belief that he has not paid his fare is not liable in a criminal prosecution for assault and battery. *State v. McDonald*, 7 Mo. App. 510. Of course the carrier, under such circumstances, would be liable only for compensatory damages. *Pine v. St. Paul City R. Co.* (Minn.), 52 N. W. 392, 52 Am. & Eng. R. Cas. 584, 16 L. R. A. 347.

27. *Goodloe v. Memphis & C. R. Co.*, 107 Ala. 233, 29 L. R. A. 729, 18 So. 166, 41 Cent. L. J. 325. So, where the assault by the employee was upon one waiting in the street in front of the carrier's carhouse to take a car, and was unauthorized and unratified by the

made the owner of every carriage running or traveling upon any turnpike road or public highway for the convenience of passengers liable to the party injured, in all cases, for all injuries and damages done by any person in the employment of such owner as a driver, while driving such carriage, to any person, or to the property of any person, and that whether the act occasioning such injury or damage be willful or negligent or otherwise, in the same manner as such driver would be liable. And the Court of Appeals held that the conductor of a street car is not the driver of a "carriage" within the meaning of the statute.<sup>28</sup> A conductor, acting in good faith, may request a passenger to leave the car for non-payment of fare, and on his refusal eject him, provided he use no more force than is reasonably necessary; and the company

carrier. *McGilvray v. West End St. R. Co.* (Mass.), 41 N. E. 116. And see *LaFitte v. New Orleans, L., etc., Co. (La.)*, 12 L. R. A. 337, 8 So. 701. In *Central Ry. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709, the act of the street car driver complained of was committed just as the passenger left the car and had gotten to the sidewalk for the purpose of making a complaint at the company's office against the driver; and it was held that the company was not responsible although the assault was prompted by a quarrel between the driver and the passenger before the latter left the car. It was suggested too that if while the car stopped momentarily before the office the passenger stepped out for the special purpose of making complaint, intending to return and resume his journey, to the knowledge of the company's servants in charge of the car, he

might still have retained the relation of a passenger to the company and be entitled to all legal rights as such as fully as if he had remained within the car. See also *Keokuk Northern Line, etc., Co. v. Drew*, 88 Ill. 608; *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568; *State v. Grand Trunk Ry. Co.*, 58 Me. 176. In one case the assault was committed by the conductor while the passenger was in the car and repeated shortly afterward at the office of the company whither the passenger had gone to make complaint to the superintendent, and it was impossible to determine from the evidence where the most serious wounds had been inflicted. Of course the company was liable. *Savannah St. R. Co. v. Bryan*, 86 Ga. 312, 12 S. E. 307.

28. *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122.

cannot be made liable therefor.<sup>29</sup> And the rule that the corporation is responsible for the willful acts of its employees while in the line of the discharge of their duty does not apply to a case where a passenger commences an altercation with the street car driver and thus produces an assault by the driver.<sup>30</sup> The carrier is never liable for an injury done to a passenger by an employee in self-defense.<sup>31</sup>

29. Chicago & E. I. R. Co. v. Casazza, 83 Ill. App. 421.

30. Scott v. Central Park, N. & E. River R. Co., 53 Hun (N. Y.), 414, 24 St. Rep. (N. Y.) 754, 6 N. Y. Supp. 382.

31. New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18, 35 L. Ed. 919, 11 Ry. & Corp. L. J. 41, 12 Sup. Ct. Rep. 190. In this case the court said: "It is not every assault by an employee that gives to the passenger a right of action against the carrier. Suppose a passenger is guilty of grossly indecent language and conduct in the presence of lady passengers, and the conductor forcibly removes him from their presence, there is no misconduct in such removal; and if only necessary force is used, nothing which gives to the party any cause of action against the carrier. In such a case, the passenger, by his own misconduct, has broken the contract of carriage, and he has no cause of action for injuries which result to him in consequence thereof. He has voluntarily put himself in a position which casts upon the employee both the right and duty of using force. \* \* \*

"There is no misconduct when the conductor uses force and does injury in simple self-defense; and the rules which determine what is

self-defense are of universal application and are not affected by the character of the employment in which the party is engaged. Indeed, while the courts hold that the liability of a common carrier to its passengers for the assaults of its employees is of a most singular character, far greater than that of ordinary employers for the actions of their employees, yet they all limit the liability to cases in which the assault and injury are wrongful."

A passenger on a street car cannot recover for abusive language addressed to him by the conductor, or for the act of the latter in knocking him down after he had left the car, where the offensive language was used and the blow struck in response to abuse and assault by the passenger, who was the aggressor. Wise v. South Covington & C. R. Co., 17 Ky. L. Rep. 1359, 34 S. W. 894. But the insult and wrong to justify the act of the employee must be real and not fancied. Texas & P. R. Co. v. Williams (C. C. App. 5th C.), 10 C. C. A. 463, 62 Fed. 440. An assault by him is not excused or the liability of the carrier defeated by the fact that the passenger had used grossly profane and abusive language to the conductor without

**§ 24. Assault, etc., upon passenger by stranger.**—A railway carrier of passengers must, under an implied police power to prevent an abuse by passengers of their privileges, exercise the highest diligence reasonably practicable to protect passengers from violence, abuse, or injury from fellow passengers.<sup>32</sup> But to make the carrier liable it must be made to appear that the conduct of the particular passenger who caused the injury was such as to have made it the duty of the employees of the company to exclude him before the injury occurred.<sup>33</sup> So the unusual rude and hasty act of a stranger in rushing through a door of a car, thereby violently striking a person on the other side, does not render the carrier liable.<sup>34</sup>

provocation. *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220, 30 Atl. 560. If he beat the passenger who slaps his face with his hand, and in so doing uses force greatly exceeding that which would appear to a reasonable man necessary to repel the assault, the carrier is liable. *St. Louis, S. W. R. Co. v. Berger*, 64 Ark. 613, 44 S. W. 809, 39 L. R. A. 784; and see *Galveston, H. S. Ry. Co. v. La Prelle* (Tex. Civ. App.), 65 S. W. 488.

32. *Mullan v. Wis. C. R. Co.*, 46 Minn. 474, 5 Am. R. & Corp. Rep. 19, 47 Am. & Eng. R. Cas. 649, 10 Ry. & Corp. L. J. 254, 49 N. W. 249; *Libby v. Maine C. R. Co.*, 85 Me. 34, 20 L. R. A. 812, 58 Am. & Eng. R. Cas. 81, 26 Atl. 943; *Illinois C. R. Co. v. Miner*, 69 Miss. 710, 16 L. R. A. 627, 52 Am. & Eng. R. Cas. 441, 11 So. 101; *Partridge v. Woodland S. Co.* (N. J.), 49 Atl. 726. But see *Pounder v. Northeastern R. Co.*, 1 Q. B. 385, 11 Ry. & Corp. L. J. 278.

33. So held in *Louisville & N. R. Co. v. McEwan*, 17 Ky. L. Rep. 406, 2 Am. & Eng. R. Cas. (N. S.) 438, 31 S. W. 365. A carrier is not liable for an injury to a passenger by another passenger shoving him in the way of a third passenger who is being ejected from the car, although the act is done in the presence and with the knowledge of the conductor. *Springfield Consol. R. Co. v. Flynn*, 55 Ill. App. 600; *International & G. N. R. Co. v. Miller* (Tex. Civ. App.), 28 S. W. 233. Writ of error denied in 87 Tex. 430, 29 S. W. 235; *Wright v. Chicago, B. & Q. R. Co.*, 4 Colo. App. 102, 35 Pac. 196.

34. *Graeff v. Phila. & R. Co.*, 161 Pa. St. 230, 23 L. R. A. 606, 34 W. N. C. 384, 28 Atl. 1107, 25 Pittsb. L. J. (N. S.) 37. And see *Chicago City R. Co. v. Considine*, 50 Ill. App. 471. The carrier is not liable for her injuries to a lady passenger whose light gauzy summer dress is ignited on an open street car by a match carelessly thrown by another

But if the conductor know or have reason to believe that a passenger is a dangerous lunatic, it is his first duty to take proper action at once for the security and protection of the other passengers against his violence, and failing to discharge such duty, to communicate to the other passengers the facts within his knowledge, showing or tending to show that they are riding in a car with a violently insane man, under no guard or restraint, to the end that they themselves may take suitable precautions for their safety.<sup>35</sup> Insult to and abuse of a passenger by a drunken and disorderly fellow passenger, which the conductor permits to continue in his presence without interference, renders the carrier liable for damages.<sup>36</sup> And it is negligence in the carrier if its servants permit a drunken and disorderly passenger once ejected from the street car to re-enter the car, although the conductor had no reason to suppose he would again assault a passenger.<sup>37</sup> But the mere

passenger after lighting a cigarette, unless it appear that the servant in charge of the car had reason to believe that the act would be done. *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1, 32 L. R. A. 167, 34 S. W. 566; *Furgason v. Citizens' St. R. Co.*, 16 Ind. App. 171, 44 N. E. 936; *Randall v. Frankford, S. & C. P. Pass. R. Co.*, 139 Pa. St. 464; *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39, 34 How. Pr. (N. Y.) 217. But see *Kreusen v. Forty-second St., etc., R. Co.*, 13 N. Y. Supp. 588; *Lott v. New Orleans City, etc., R. Co.*, 37 La. Ann. 337.

35. *St. Louis, I. M. & S. R. Co. v. Meyer* (C. C. App. 8th C.), 40 U. S. App. 554, 23 C. C. A. 100, 77 Fed. 150. And see *Rommel v. Shambacher*, 120 Pa. St. 579; Rich-

mond & D. R. Co. v. *Jefferson*, 89 Ga. 544, 17 L. R. A. 571; *Meyer v. St. Louis, I. M. & S. R. Co.*, 54 Fed. 116; *St. Louis, A. & T. R. Co. v. Mackie*, 71 Tex. 491, 1 L. R. A. 667; *Louisville & N. R. Co. v. Finn*, 16 Ky. L. Rep. 57.

36. *Lucy v. Chicago, G. W. R. Co.*, 64 Minn. 7, 31 L. R. A. 551, 65 N. W. 944. But the carrier is not liable to a passenger for injuries received by reason of being tripped by a drunken passenger who is being ejected from the car by the conductor exercising due care. *Cobb v. Boston El. Ry. (Mass.)*, 60 N. E. 476. And see *Kinney v. Louisville & N. R. Co.*, 99 Ky. 59, 17 Ky. L. Rep. 1405, 34 S. W. 1066.

37. *United Ry. & El. Co. v. State (Md.)*, 49 Atl. 923.

presence of an intoxicated passenger is not presumed to be dangerous to other passengers. There is no such privity between a railway company and a passenger as to make it liable for a wrongful act of the passenger upon any principle.<sup>38</sup> But a railroad company has the power of refusing to receive as a passenger, or to expel any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of the other passengers, and may exercise all necessary power and means to eject from the cars any one so imperiling the safety of or annoying others; and this police power the conductor, or other servant of the company in charge of the car, is bound to exercise with all the means he can command whenever occasion requires. If this duty is neglected without good cause and a passenger receive injury which might have been reasonably anticipated or naturally expected, from one who is improperly received or permitted to continue as a passenger, the carrier is responsible.<sup>39</sup> If there be no conductor upon the car and a passenger is injured in a riotous fight among other passengers, it is for the jury to say from all the facts whether the company was negligent in failing to have a conductor, or whether the driver of the car was negligent in the performance of his duty.<sup>40</sup>

**§ 25. Ejection by employee.**— A carrier must see that its passenger is not exposed to the indignity of a public ejection from the car during the progress of the trip for which the carrier has agreed to carry him through the negligence or

38. Pittsb., F. W. & C. R. Co. v. Hinds, 53 Pa. St. 512. (N. S.) 383, revg. 36 N. Y. Super. Ct. (4 J. & S.) 195.

39. Putnam v. Broadway & Seventh Ave. R. Co., 55 N. Y. 108, 113, 14 Am. Rep. 190, 15 Abb. Pr. 40. Holly v. Atl. St. R. Co., 61 Ga. 215.

mistake of its agent in refusing a proper tender of fare, or in assuming that he had not paid his fare.<sup>41</sup> But the carrier has the right to eject the passenger for nonpayment of fare, using no unnecessary force; and this right is not affected by any belief the passenger may have as to his right to ride on an expired ticket which he has tendered and which has been refused.<sup>42</sup> If the passenger pay his own fare, but refuse to pay the fare of a child under his care, for whom a fare could be exacted, such refusal will justify his expulsion, though he himself is a minor.<sup>43</sup> In expelling a passenger the carrier must take reasonable care to see that he is not injured, and

41. *Kiley v. Chicago City R. Co.*, 90 Ill. App. 275; affd., 189 Ill. 384, 59 N. E. 794. In the case cited it appeared that the agent of the defendant had given the plaintiff, the passenger, by mistake a wrong ticket or transfer.

42. *Rudy v. Rio Grande, W. R. Co.*, 8 Utah, 165, 52 Am. & Eng. R. Cas. 351, 30 Pac. 366, 12 Ry. & Corp. L. J. 124; *Elmore v. Sands*, 54 N. Y. 512. A street car passenger receiving from the driver a package of nickels marked "Fifty Cents," containing however but forty-five cents, in exchange for a fifty cent piece, cannot be lawfully ejected for refusing to put five cents in the box, although he is assured by the driver that if he will put the fare in the box the mistake will be corrected at the office of the company. *Curtis v. Louisville City R. Co.*, 94 Ky. 573, 21 L. R. A. 649, 23 S. W. 363, 15 Ky. L. Rep. 351. And see *Corbett v. Twenty-third St. Ry. Co.*, 42 Hun (N. Y.), 587. A passenger on a car secured a transfer to another line of the

same carrier and was directed by the conductor, who issued it, to take a certain car, the conductor of which informed him that the transfer was not good and asked plaintiff if he was not going to get off and took him by the arm and roughly pulled him on to the pavement. *Held*, a verdict for plaintiff was justified. *Hayter v. Brunswick Tract. Co.* (N. J. Sup.) 49 Atl. 714. But a street railroad is not liable for ejecting a person presenting a transfer ticket from a connecting road which is not acceptable under the reasonable rules of the company, where a mistake in issuing the same was made by an employee of the connecting road, there being no community of interest between the two companies and the business of each being independent. *Jacobs v. Third Ave. R. Co.*, 34 Misc. (N. Y.) 512, 69 N. Y. Supp. 981; revg. 68 N. Y. Supp. 623.

43. *Warfield v. Louisville & N. R. Co. (Tenn.)*, 55 S. W. 304.

if the expulsion is made while the car is in motion and the passenger sustains injury thereby which he would not have sustained had he been ejected while the car was at a stand still, the company is liable for the injury. The mere fact that the car is in motion at the time of the expulsion will not justify a recovery against the carrier for any injury which may result. It must appear that the injury solely resulted from the ejection while the car was in motion, or from the negligence of the carrier; generally it is a question for the jury.<sup>44</sup> But the expulsion of the passenger while the car is in motion is apparently so dangerous an act that it may justify the same resistance on the part of the passenger as if it were a direct attempt to take his life; and such resistance will not be deemed to present a case of concurrent negligence on his part.<sup>45</sup> Any disorderly conduct, like the use of indecent or profane language which might constitute a breach of the peace, for which a person might be fined or imprisoned, will justify the conductor of a street car in ejecting the offender;<sup>46</sup>

44. *Cleveland City Ry. Co. v. Roebeck*, 22 Ohio C. C. 99, 12 O. C. D. 262; *Lovett v. Salem & South D. R. Co.*, 9 Allen (Mass.), 537. It is for the jury, even though it appear the passenger was intoxicated. *Healey v. City Pass. R. Co.*, 28 Ohio St. 23; *Murphy v. Union R. Co.*, 118 Mass. 228; *Flynn v. Central Park, etc., R. Co.*, 49 N. Y. Super. Ct. 81; *Oppenheimer v. Manhattan R. Co.*, 45 St. Rep. (N. Y.) 134, 18 N. Y. Supp. 411.

45. *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343. And see *Higgins v. Watervliet Tp. Co.*, 46 id. 23; *Isaacs v. Third Ave. R. Co.*, 47 id. 122; *Chicago City Ry. Co. v. Pelletier*, 134 Ill. 120, 24 N. E. 770. As matter of law, it is neg-

ligence on the part of the carrier to compel a small child, though a trespasser, to jump from the platform of a moving car. *Biddle v. Hestonville, etc., Ry. Co.*, 112 Pa. St. 551; *Pittsb., etc., Ry. Co. v. Donahue*, 70 id. 119. And see *Day v. Brooklyn City R. Co.*, 12 Hun (N. Y.), 435; *affd.*, 76 N. Y. 593; *Union Pac. R. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244.

46. *Robinson v. Rockland, T. & C. R. Co.*, 87 Me. 387, 32 Atl. 994, 29 L. R. A. 530. It was held that the passenger in a crowded street car in which there were many ladies, being requested by the conductor to stop swearing and denying his guilt and calling the conductor "a damned liar," etc.,

so will his refusal, upon request, to remove his feet from the cushions of the seats;<sup>47</sup> so will his violation of any reasonable rule of the company which is called to his attention.<sup>48</sup> If the passenger be so intoxicated as to make it reasonably certain that by act or speech he will become obnoxious or annoying to other passengers, although he has committed no act of offense or annoyance, he may be ejected.<sup>49</sup> If a carrier's

should be ejected from the car, even if the conductor was first in error in charging him with profanity. And see *Flynn v. Central Park, etc., R. Co.*, 49 N. Y. Super. Ct. 81; *Chicago City Ry. Co. v. Pelletier*, 134 Ill. 120, 24 N. E. 770; *Eads v. Met. Ry. Co.*, 43 Mo. App. 536; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499. On the question whether he was guilty of disorderly conduct, in an action for his ejection, it is error to admit evidence that after he was ejected he was arrested and charged with disorderly conduct at the time of the ejection and was acquitted. *Vadney v. Albany Ry.*, 47 App. Div. (N. Y.) 207, 62 N. Y. Supp. 140. That a passenger leaves his seat to protest with the conductor against what he considers unnecessary roughness in handling an intoxicated person does not constitute a waiver of his rights as a passenger, freeing the company from liability for the conductor's act in ejecting him. *Weber v. Brooklyn, Q. C. & S. R. Co.*, 47 App. Div. (N. Y.) 306, 62 N. Y. Supp. 1.

47. *Davis v. Ottawa El. R. Co. (Can.)*, 28 Ont. 654; *Louisville & N. R. Co. v. Logan*, 88 Ky. 232, 3 L. R. A. 80; *Gulf C. & S. F. R. Co. v. Adams*, 3 Tex. App. Civ.

Cas., § 422, p. 493; *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601.

48. *Gulf C. & S. F. R. Co. v. Moody*, 3 Tex. Civ. App. 622; *McMillan v. Federal St., etc., R. Co.*, 172 Pa. St. 523, 33 Atl. 560, 37 W. N. C. 543, 26 Pittsb. L. J. (N. S.) 303; *Fort Clark St. R. Co. v. Ebaugh*, 49 Ill. App. 582; *Montgomery v. Buffalo Ry. Co.*, 24 App. Div. (N. Y.) 454, 48 N. Y. Supp. 849. See 158 N. Y. 708; *Meyer v. Second Ave. R. Co.*, 8 Bosw. (N. Y.) 305.

49. *Edgerly v. Union St. R. Co.*, 67 N. H. 312, 36 Atl. 558; *Vinton v. Middlesex, 11 Allen (Mass.)*, 304, 87 Am. Dec. 714; *Murphy v. Union R. Co.*, 118 Mass. 228, 230. A peaceful drunken person, kicked off the platform of a street car, may recover for his injuries. *Texas & P. R. Co. v. Edmond* (Tex. Civ. App.), 29 S. W. 518. Although the passenger is sick and his offensive conduct is not willful or voluntary, it will not affect the right of the carrier's servants to remove him. Proper care however must be exercised for his protection and safety upon removal. *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57, 6 So. 536.

servant uses more force than is necessary to eject the passenger, the company will be liable.<sup>50</sup> But where the violence was due to conduct of the party ejected, calculated to arouse the conductor's resentment and render him unfit for the proper discharge of his duties, the carrier is not liable for the excessive force used.<sup>51</sup> A person rightfully on the car has the right to refuse to be ejected from it and to make a sufficient resistance to being put off to denote that he is being removed by expulsion and against his will.<sup>52</sup> If not rightfully on the car and he resists ejection and the injury happens and can be attributed, in part at least, to his own wrongful conduct, the carrier is not responsible.<sup>53</sup> One wrongfully ejected from a street railway car is entitled to recover, although no actual personal injury is suffered.<sup>54</sup> The conductor is not justified in any case in ejecting a person from his car under circumstances which makes such ejection dangerous to life or limb.<sup>55</sup> But the carrier owes no duty to a trespasser ejected from its train to provide shelter, or see that he incurs

50. Haman v. Omaha Horse R. Co., 35 Nebr. 74, 52 N. W. 830; Schaefer v. North Chicago St. R. Co., 82 Ill. App. 473; Burns v. Glens Falls, etc., R. Co., 4 App. Div. (N. Y.) 426, 38 N. Y. Supp. 856; Lake Erie & W. R. Co. v. Matthews, 13 Ind. App. 355, 41 N. E. 842; Galveston, etc., R. Co. v. McMonigal (Tex. Civ. App.), 25 S. W. 341; Hamilton v. Third Ave. R. Co., 53 N. Y. 25, revg. 35 N. Y. Super. Ct. (3 J. & S.) 118, 13 Abb. Pr. (N. S.) 318; Jackson v. Second Ave. R. Co., 47 N. Y. 274; Tanger v. S. W. Mo. El. Ry. Co., 85 Mo. App. 528.

51. City El. R. Co. v. Shropshire, 110 Ga. 33, 28 S. E. 508.

52. Lucas v. Michigan C. R. Co.,

98 Mich. 1, 56 S. W. 1039; Pittsb., etc., R. Co. v. Russ (C. C. App. 7th C.), 6 C. C. A. 597, 57 Fed. 822.

53. McCullen v. N. Y. & N. S. R. Co., 68 App. Div. (N. Y.) 269.

54. Light v. Harrisburg & M. El. R. Co., 4 Pa. Super. Ct. 427, 40 W. N. C. 352; Rown v. Christopher & Tenth St. R. Co., 34 Hun (N. Y.), 471; Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Lyons v. Broadway & Seventh Ave. R. Co., 32 St. Rep. (N. Y.) 232, 10 N. Y. Supp. 237; North Chicago St. R. Co. v. Gastka, 128 Ill. 613, 21 N. E. 521, 4 L. R. A. 481.

55. Chicago City R. Co. v. Pelletier, 33 Ill. App. 455. And see 134 Ill. 120.

no risk from the inclemency of the weather or the fury of the elements other than that of common humanity to abstain from unnecessary violence or from exercising its right under circumstances savoring of harshness and cruelty.<sup>56</sup> That the passenger left the car at the command of the conductor and without waiting to be forcibly expelled does not prevent his action for injuries if the expulsion were wrongful; and the humiliation and injury to his feelings caused by the insulting remarks of the conductor may enhance his damages.<sup>57</sup>

**§ 26. Care of parcels left in car.**— Whether the passenger is ejected or whether from any other cause he inadvertently leaves a parcel in the car, it is matter ordinarily of regulation for the carrier company that its employees should take charge of it. It is a matter of ordinary convenience for passengers to carry with them light and portable articles, and necessarily of very common occurrence that they should occasionally leave such articles behind them on quitting the cars. The carrier should make it the duty of its conductors to take charge of property so left, and should provide a place for its safe-keeping where the owner may apply for it; thereby the security of travel by street cars is materially enhanced; and where such a general regulation is adopted, it must be deemed

56. *Burch v. Balt. & P. R. Co.* (D. C. App.), 22 Wash. L. Rep. 401, 3 App. D. C. 346, 26 L. R. A. 129. As to exposure of ejected drunken passenger to danger, see *Roseman v. Carolina C. R. Co.*, 112 N. C. 709, 19 L. R. A. 327, 16 S. E. 766; *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L. R. A. 372, 19 So. 51.

57. *Eddy v. Syracuse Rapid-Transit Ry. Co.*, 50 App. Div. (N.

Y.) 109, 63 N. Y. Supp. 645; *Ray v. Cortland & H. Tract. Co.*, 19 App. Div. (N. Y.) 530, 46 N. Y. Supp. 521; *Consol. Tract. Co. v. Taborn*, 58 N. J. L. (29 Vroom) 1; affd., id. 408, 2 Am. & Eng. R. Cas. (N. S.) 124, 32 Atl. 685; *Central R. & Bkg. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315; *Watson v. Oswego St. R. Co.*, 7 Misc. Rep. (N. Y.) 562, 58 St. Rep. (N. Y.) 356, 28 N. Y. Supp. 84.

as much a part of the railroad company's business as the carriage of the passenger. It does not engage for the carriage of property of the kind, and does not incur respecting it the extraordinary liability which the law imposes upon common carriers, but the existence of the regulation it has adopted shows that it has undertaken, as incidental to its business, to take charge of the parcel, if left in the cars, when the fact is brought to its knowledge, and the specific compensation which it receives for the carriage of the passenger is sufficient to constitute it a bailee for hire while the property remains in its custody.<sup>58</sup> In Pennsylvania a case arose in which it appeared that the passenger inadvertently left a pocket-book containing more than \$100 in money in the car, which the conductor delivered to the proper representative of the carrier; the finding of the pocket-book was advertised and nobody appearing to claim it for a year, the conductor finding it demanded a return of it and its contents to himself, and upon refusal to deliver, brought suit, and it was held that he was entitled to recover the value.<sup>59</sup>

**§ 27. False arrest.—** If an illegal arrest and a false imprisonment be made upon the charge of a conductor of a street car

58. Morris v. Third Ave. R. Co.,<sup>1</sup> Daly (C. P. N. Y.), 202, 205. In the case cited, the plaintiff had left her satchel in the car containing articles valued at \$100. The conductor's attention being called to the fact, he took charge of it, and upon the return trip placed it in the care of the carrier's receiver of such articles, by whom it was delivered to a person who had no right or claim to it; and it was held that it was a question for the jury as to whether there was negligence on the part of the com-

pany; that where property so comes into the possession of the carrier through the owner's neglect or inadvertence, and where the carrier may not know to whom it belongs or by whom it was left, it should not be held responsible for delivering it to the wrong person, if it has exercised all the care and vigilance that could reasonably be expected of it under the circumstances.

59. Tatum v. Sharpless (Pa.), 6 Phila. 18.

of a passenger without a warrant, the carrier is liable if the conductor acted within the line of his employment.<sup>60</sup> A statute giving the conductor all the powers of a conservator of the peace while in charge of the car does not relieve the carrier from liability for false imprisonment of a passenger made or caused to be made by him.<sup>61</sup> But the carrier is not liable for a malicious prosecution and false imprisonment of a passenger caused to be arrested by its conductor on a charge, say for passing counterfeit money, unless the con-

60. Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 715, 2 Am. & Eng. R. Cas. (N. S.) 418, 41 Pac. 952, 29 L. R. A. 465; King v. Ill. C. R. Co., 69 Miss. 245, 10 So. 42; Hoffman v. N. Y. C., etc., R. Co., 87 N. Y. 25; Krulevitz v. Eastern R. Co., 143 Mass. 228, 9 N. E. 613; White v. Twenty-third St. R. Co., 20 Week. Dig. (N. Y.) 510; Rown v. Christopher & Tenth St. R. Co., 34 Hun (N. Y.), 471; Shea v. Manhattan R. Co., 27 St. Rep. (N. Y.) 33, 7 N. Y. Supp. 497, affg. 15 Daly, 528, 8 N. Y. Supp. 332, 29 St. Rep. (N. Y.) 313.

61. Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798. Where a policeman, called by the conductor of the car, arrested a passenger and took him off on the charge of riding without payment of fare, the carrier was not liable for false imprisonment, since the conductor had been authorized only to put delinquent passengers off the car. Little Rock Tract. & E. Co. v. Walker, 64 Ark. 144, 45 S. W. 57, 40 L. R. A. 473. And see Central R. Co. v. Brewer, 78 Md. 394, 27 L. R. A. 63, 28 Atl. 615;

Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 348; Pressley v. Mobile & G. R. Co., 15 Fed. 199; Eastern Co. R. Co. v. Broom, 6 Exch. 314; Poultan v. London & S. W. R. Co., L. R., 2 Q. B. 534; Allen v. London & S. W. R. Co., L. R., 6 id. 65. Where the passenger had purchased a ticket for passage upon defendant's railway and entered his car, and before reaching his destination lost his ticket, and attempting to pass through the gate from the station platform was stopped by the gatekeeper and told he could not pass until he produced a ticket, or paid his fare, and he stated his loss; nevertheless, the gatekeeper sent for a police officer and ordered his arrest, and it appearing that the defendant had given orders to its gatekeepers not to let passengers pass out until they either paid their fares or showed tickets, in an action for false imprisonment it was held that the detention was unlawful, and that defendant was responsible for the acts of the gatekeeper. Lynch v. Met. El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141.

ductor acted within the scope of his authority, express or implied, or the carrier ratified his proceedings.<sup>62</sup>

**§ 28. Injury to passenger in collision with other vehicle.—** In its relation to persons other than passengers or employees upon the car, the law requires ordinary care upon the part of the carrier, but does not require such extraordinary care as may be, under some circumstances, necessary to avoid running into vehicles upon its tracks.<sup>63</sup> But as to passengers the carrier is bound to exercise the greatest diligence to secure them safe transportation and to prevent collision with a car upon a crossing track, or with any other vehicle. The driver of a horse car might well be found guilty of negligence in approaching the crossing of another railroad track at a rate of speed which would not enable him to stop his car almost instantly upon discovering another car approaching on such track; and if he do approach at such a slackened

62. *Knight v. N. Met. T. Co.* (Q. B.), 7 Law T. Rep. 227; *Cunningham v. Seattle El. L. & P. Co.*, 3 Wash. 471, 28 Pac. 745; *La Fitte v. New Orleans & Lake R. Co.* (La.), 12 L. R. A. 337, 8 So. 701; *Mulligan v. N. Y. & R. B. R. Co.*, 129 N. Y. 506, 42 St. Rep. (N. Y.) 83, 29 N. E. 952, 14 L. R. A. 791. But it has been held that a ticket agent who follows a woman who has bought a ticket out upon the platform and charges her with having given him counterfeit money with demand for other money in its stead, and on her refusal, insults her by slandering her character, and puts his hand upon her, telling her not to stir until he gets a policeman to arrest and search her, and then lets her go when he fails to get an officer—is

acting within the scope of his employment, and the carrier is liable for false imprisonment and slander, if the charges were false and the detention was unlawful. *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 40 St. Rep. (N. Y.) 894, 30 N. E. 1001, 16 L. R. A. 136. And see *Nowack v. Met. St. Ry. Co.*, 166 N. Y. 433; *Barry v. Third Ave. R. Co.*, 51 App. Div. (N. Y.) 385, 64 N. Y. Supp. (98 St. Rep.) 615; *Lezensky v. Met. St. Ry. Co.* (C. C. App. 2d C.), 59 U. S. App. 588, 88 Fed. 437, 31 Chic. Leg. N. 42.

63. *McGary v. W. Chicago St. R. Co.*, 85 Ill. App. 610; *Hoffman v. Syracuse R. T. Ry. Co.*, 50 App. Div. (N. Y.) 83, 63 N. Y. Supp. 442; *Holzman v. Met. St. R. Co.*, 31 Misc. Rep. (N. Y.) 644, 64 N. Y. Supp. 1120.

rate of speed, it would also be a question for the jury whether he was not negligent in attempting the experiment of crossing in front of the other car, when to remain where he was and await its crossing would result in absolute safety.<sup>64</sup> If the driver by his own negligence has placed himself and the passengers of the car in a situation of peril, and being called upon in a sudden exigency to act, mistake his best course through an error of judgment, the company is not thereby relieved;<sup>65</sup> as to the passenger, the fact that the collision with another vehicle occurred by reason of the negligence of the driver of the latter vehicle does not relieve the carrier from liability for its negligence, provided it has been the efficient and proximate cause of the injury.<sup>66</sup> In an action by a passenger to recover for injuries occasioned by a collision with another car or with another vehicle there is a presumption of negligence on the part of the carrier; but no such presumption obtains as against the owner of the other vehicle although made a party defendant.<sup>67</sup> The rule that the motor-man or gripman on the car has the right to assume that a

64. Schneider v. Third Ave. R. Co., 133 N. Y. 583, 44 St. Rep. (N. Y.) 680; Zimmer v. Third Ave. R. Co., 36 App. Div. (N. Y.) 265, 55 N. Y. Supp. 308.

65. Schneider Case, *supra*; Morris v. Railway Co., 148 N. Y. 182.

66. W. Chicago St. R. Co. v. Tuerk, 90 Ill. App. 105; Chicago & A. R. Co. v. McDonnell, 91 id. 488; Green v. Pac. Lumber Co., 130 Cal. 435, 62 Pac. 747; West Chicago St. R. Co. v. Williams, 87 Ill. App. 548; Keegan v. Third Ave. R. Co., 34 App. Div. (N. Y.) 297, 54 N. Y. Supp. (88 St. Rep.) 391; Cincinnati St. R. Co. v. Murray, 3 Ohio Dec. 72, 9 Ohio C.

C. 291; Devlin v. Atlantic Ave. R. Co., 57 Hun (N. Y.), 591, 32 St. Rep. (N. Y.) 938, 10 N. Y. Supp. 848; Fox v. Brooklyn City R. Co., 7 Misc. (N. Y.) 285, 58 St. Rep. (N. Y.) 540, 27 N. Y. Supp. 895; Watkins v. Atlantic Ave. R. Co., 20 Hun (N. Y.), 237; Seidlinger v. Brooklyn City R. Co., 28 Hun (N. Y.), 503; Smith v. St. Paul City Ry. Co., 32 Minn. 1, 16 Am. & Eng. Ry. Cas. 310, 18 N. W. 827.

67. Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988; Falke v. Third Ave. R. Co., 38 App. Div. (N. Y.) 49, 55 N. Y. Supp. (89 St. Rep.) 984.

wagon on the track will move out of the way until something appears showing that it cannot move, does not apply to an action by a passenger against the company for injuries sustained in collision with the wagon;<sup>68</sup> nor can the carrier assume that its right of way to cross first at a crossing of two railroad tracks would be respected by a car approaching upon the other track as against its passenger.<sup>69</sup> The street railway company is responsible for injuries received by passengers at a railroad crossing where the collision occurred with a passenger train when the accident was due to the inexperience of the motorman and the company's failure to provide a conductor to assist in properly applying the back brakes;<sup>70</sup> or for failure of the servants upon the car to go forward upon the tracks at the railroad crossing to a position where they could ascertain whether or not a steam train was approaching the crossing.<sup>71</sup> The duty of the servants of the

68. Sweeney v. Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682; Sears v. Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081. But it has been held that an electric railway company is not chargeable with negligence or liable for injuries sustained by a passenger where the car ran into another thrown upon the track about 150 feet in front of it because of a collision with a beer wagon, when the motorman applied the brakes and remained at his post, and made every reasonable effort to stop the car. Snediker v. Nassau El. R. Co., 41 App. Div. (N. Y.) 628, 58 N. Y. Supp. 457.

69. Goorin v. Allegheny Tract. Co., 179 Pa. St. 327, 333, 36 Atl. 207, 1129. Unless a carrier know a passenger is in peril, it is not bound on stopping on the east side

of a crossing to give warning of its car starting to cross the street, where an ordinance required street cars moving west to stop on the west side of a street to discharge passengers, and also compelling them to stop on the east side until signaled by the flagman to cross. Pryor v. Met. St. Ry. Co., 85 Mo. App. 367.

70. Flourney v. Shreveport Belt Ry. Co., 50 La. Ann. 491, 23 So. 465. And see Hammond W. & E. C. El. R. Co. v. Spyzechalski, 17 Ind. App. 7, 46 N. E. 47.

71. West Chicago St. R. Co. v. Martin, 47 Ill. App. 610. And see Coddington v. Brooklyn Cross-town R. Co., 102 N. Y. 66; Barrett v. Third Ave. R. Co., 45 id. 628, affg. 31 N. Y. Super. Ct. (Sweeny) 568, 8 Abb. Pr. (N. S.) 205.

street railway company to exercise extraordinary diligence for the protection of its passengers applies not only to those having control of the car in which the passenger is traveling, but also to those having control of another car approaching on a parallel track after they have discovered that the former car is about to discharge passengers who may alight dangerously near to such parallel track.<sup>72</sup> The mere fact that the carrier has instructed its servants with regard to its duty in exercising care at a railroad crossing will not relieve the company from liability for injury caused by a collision at such crossing due to the conductor's negligence.<sup>73</sup> But the carrier's servants are not bound to infer danger from a wagon proceeding on a parallel track; to infer, for example, that a wagon loaded with lumber protruding beyond the rear wheels would suddenly be turned off the parallel track and the end of the lumber would be forced into the car and thus injure a passenger;<sup>74</sup> nor is it bound to assume that, upon an electric railroad running through woods and fields by frequent curves and on a steep grade where the cars are run rapidly and but two minutes apart, an injury would occur by the forward car stopping to adjust its trolley and the rear car colliding with it.<sup>75</sup>

72. Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41.

73. Hammond, etc., R. Co. v. Spyzechalski, 17 Ind. App. 1, 46 N. E. 47.

74. Alexander v. R. C. & B. R. Co., 128 N. Y. 13, 27 N. E. 950, 38 St. Rep. (N. Y.) 254. And see Wynn v. Central Park, N. & E. River R. Co., 133 N. Y. 575, 44 St. Rep. (N. Y.) 673; Marks v. Rochester R. Co., 41 App. Div. (N. Y.) 66, 58 N. Y. Supp. (92 St. Rep.) 210.

75. Blanchette v. Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481. But see Costegan v. Warren, B. & S. St. Ry. Co. (Mass.), 55 N. E. 317; Chicago, etc., Ry. Co. v. Young, 58 Nebr. 678; Oliver v. Railroad Co., 55 S. C. 541; International & G. N. R. Co. v. Williams, 29 Tex. Civ. App. 587; King v. Railway Co. (Del.), 1 Pennewill, 452; Louisville & N. R. Co. v. Bell, 100 Ky. 203, 38 S. W. 3. For additional authorities as to collision with other vehicles, see Atchison,

**§ 29. Position of apparent peril.**— The impulsive and unguarded act of a passenger, resulting in injury, while trying to escape from a car because of a reasonable fear due to the mismanagement of the carrier, is to be deemed a consequence of such mismanagement for which the carrier is responsible.<sup>76</sup> So, in the use of electrical appliances, the carrier is bound

T. & S. F. Ry. Co. v. Gen. El. Ry. Co., 24 Am. & Eng. R. Cas. (N. S.) 541, 112 Fed. 689; West Chicago St. R. Co. v. Tuerk, 193 Ill. 385, 61 N. E. 1087, affg. 90 Ill. App. 105; Chicago City Ry. Co. v. Anderson, 193 Ill. 9, 61 N. E. 999, affg. 93 Ill. App. 419; Vincent v. Norton & T. St. Ry. Co. (Mass.), 61 N. E. 822; McAndrew v. St. L. & S. Ry. Co., 88 Mo. App. 97; Hanselman v. St. L., etc., R. Co., id. 123; Hutchinson v. same, id. 376; McCracken v. Consol. Tract. Co. (Pa.), 50 Atl. 830; Bass' Admir. v. Norfolk Ry. & L. Co. (Va.), 40 S. E. 100; Hurley v. West End St. Ry. Co. (Mass.), 62 N. E. 263; Penman v. McKeesport, etc., Ry. Co. (Pa.), 50 Atl. 973; Cowden v. Shreveport Belt Ry. Co., 106 La. Ann. 236, 30 So. 747; Campbell v. Consol. Tract. Co. (Pa.), 50 Atl. 829; Jackson v. United Tract. Co., 18 Pa. Super. Ct. 211; Marchal v. Indianapolis St. Ry. Co. (Ind. App.), 62 N. E. 286; Edwards v. Foote (Mich.), 88 N. W. 404, 8 Det. Leg. N. 880; Hamilton v. Consol. Tract. Co. (Pa.), 50 Atl. 946; Parkinson v. Concord St. Ry. (N. H.), 24 Am. & Eng. R. Cas. N. S. 575, 51 Atl. 268. An accident resulting from the direction of a street railroad company inspector, to one injured, to drive upon the tracks of the railroad, and

to the motorman to proceed with his car around the curve, causing collision, creates a liability against the company. Gay v. Brooklyn H. R. Co., 69 App. Div. 563. As to a cause of action arising to a pedestrian caught between two street cars going in opposite direction, see O'Callaghan v. Met. St. R. Co., 69 App. Div. 574; and see Handy v. same, 70 App. Div. (N. Y.) 27.

76. Gannon v. N. Y., etc., R. Co., 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833, 5 Am. Neg. Rep. 613; Heath v. Glens Falls, etc., St. R. Co., 90 Hun (N. Y.), 560, 71 St. Rep. (N. Y.) 29, 36 N. Y. Supp. 22; Floutrup v. Boston & M. R. Co., 163 Mass. 152, 39 N. E. 797; Dallas Consol. Tract. Ry. Co. v. Randolph (Tex. Civ. App.), 5 Am. Electl. Cas. 379, 383; Twomley v. Central Park, etc., R. Co., 69 N. Y. 158; Adams v. Hannibal, etc., R. Co., 71 Mo. 553; Pa. R. Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843; Chicago, etc., R. Co. v. Clough, 134 Ill. 586, 25 N. E. 664; Knowlton v. Milwaukee City Ry. Co., 59 Wis. 278; Holzab v. New Orleans, etc., R. Co., 38 La. Ann. 185; Dinney v. Wheeling & E. G. R. Co., 28 W. Va. 32; South Covington, etc., Ry. Co. v. Ware, 84 Ky. 267, 1 S. W. 493.

to use the very highest degree of care to see that those in use on the car do not get out of order and so endanger the safety of passengers.<sup>77</sup> Where, by reason of the electric current being suddenly reversed to prevent a collision the circuit breaker blew out, causing a loud explosion and a flash of light in the car, followed by the crash of breaking glass from the collision, the fact that a nervous woman was injured by jumping from the car while the other passengers remained in the car uninjured, did not preclude her from a recovery against the carrier for her injuries.<sup>78</sup> The general

77. So held in an action for injuries received by a woman in jumping from an electric car, where it appeared by the evidence that the entire car was enveloped in flames caused by defective insulation of the cables underneath the car. *Leonard v. Brooklyn Heights R. Co.*, 7 Am. Electl. Cas. 683, 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985; in this case, electrical experts testified that if flames first appeared underneath an electric car in the rear and then on the side and the front, the fire might be due to defective insulation of the underneath cables; and that any depreciation in the quality of insulation, due to wearing away of the rubber insulation, could be found by a weekly application of the magnetometer, or volt meter test, made by one man in fifteen minutes. Employees of the company admitted that this test was known by the railroad men, but they only made the test once a year or when looking for trouble. The morning of the accident the company's inspector examined the cable on the car, running his hand

over it and looking where the cable was liable to wear or burn off, and found everything all right; held, that the question whether the accident was caused by defective insulation, and whether the company used due care in its inspection was for the jury. And see *Poulsen v. Nassau El. R. Co.*, 7 Am. Electl. Cas. 675, 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941; *Olga Poulsen v. Nassau El. R. Co.*, 7 Am. Electl. Cas. 677, 30 App. Div. (N. Y.) 246, 51 N. Y. Supp. 933; *Buckbee v. Third Ave. R. Co.*, 7 Am. Electl. Cas. 692, 64 App. Div. (N. Y.) 360.

78. *Wanzer v. Chippewa Valley El. R. Co.*, 108 Wis. 319, 84 N. W. 423. And see *Texarkana St. R. Co. v. Hart* (Tex. Civ. App.), 26 S. W. 435. So a passenger on a stalled electric car is not negligent as matter of law in attempting to jump from the car on suddenly noticing that there is danger of another car colliding with it. *Quinn v. Shamokin & M. C. El. R. Co.*, 7 Pa. Super. Ct. 19; *Shankenberry v. Met. St. R. Co. (C. C. W. D. Mo.)*, 46 Fed. 177.

rule is that a person placed by the reckless or careless acts of the servants or agents of another in such a position as to be compelled to choose upon the instant and in the face of an apparently great and impending peril between two hazards, a dangerous leap from the moving car, or to remain in the car at a certain peril, is not precluded from recovery against the carrier for injuries thereby sustained. It is for the jury to say whether any one of ordinary prudence placed in the same situation would have acted in the same manner, and the outcries of other passengers in the same peril are competent upon the question as to whether the alarm of the person injured was unreasonable.<sup>79</sup> So, a passenger, attempting to board a street car which starts after she has her foot upon the step and her hand upon the railing, is not necessarily negligent in continuing her hold upon the car after it starts, since, being placed in sudden peril by the negligence of the carrier, she is not held to strict accountability for her mode of action.<sup>80</sup> But there must be a reasonable apprehension of danger and the carrier is not liable for an injury to passengers occasioned by her jumping from the car under a reasonable apprehension of danger, where there was no real danger, and the apparent danger was caused, not by the negligence of the carrier, but of the gateman, not a servant of the carrier, at a railway crossing, and his confusion and contradictory

79. Twomley v. Central Park, etc., R. Co., 69 N. Y. 158; Odom v. St. Louis S. W. R. Co., 45 La. Ann. 1201, 14 So. 734, 23 L. R. A. 152; Carruth v. Texas & P. R. Co., 45 La. Ann. 1228, 14 So. 736; West Chicago St. R. Co. v. Lyons, 57 Ill. App. 536; Lacas v. Detroit City R. Co., 92 Mich. 412, 52 N. W. 745. When the motorman was in no danger, but upon an explo-

sion abandoned his post and jumped over the front seat among the passengers, one of whom was thus frightened and injured, the whole question is for the jury. Dunlay v. Tract. Co., 18 Pa. Super. Ct. 206.

80. Joliet St. Ry. Co. v. Duggan, 45 Ill. App. 450. And see Washington & G. R. Co. v. Hickey (D. C. App.), 23 Wash. L. Rep. 177.

warnings and signals, no negligence on the part of the driver of the street car being shown.<sup>81</sup>

**§ 30. Rate of speed.**— Negligence on the part of the carrier can never be predicated upon the rate of speed alone. There must be other circumstances in relation to which the speed may be a negligent act, unless, of course, the rate is limited and any excess of such limitation is prohibited by statute or ordinance of the municipality in which the car is operated.<sup>82</sup> A street car company is not justified in running its cars at a high speed past a car standing on a parallel track to allow passengers to alight who might cross to either side of the street, thereby rendering the place appointed for passengers to alight dangerous.<sup>83</sup> Nor should an electric car be propelled over an uneven track at such a speed as to cause it to sway, and thereby bring the head of a passenger who had risen to signal the conductor against a trolley pole standing two feet from the open car;<sup>84</sup> nor should it be driven at a high rate of speed on a down grade upon a switch known by the driver to be dangerous.<sup>85</sup>

81. Kleiber v. People's R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613. And see Getman v. D., L. & W. R. Co., 162 N. Y. 21.

82. Francisco v. Troy & L. R. Co., 5 Am. Electl. Cas. 374, 78 Hun (N. Y.), 13; Walters v. Collins Park & Belt R. Co., 5 Am. Electl. Cas. 387, 95 Ga. 519; Cameron v. Union Trunk Line, 5 Am. Electl. Cas. 388, 10 Wash. 507; Sirk v. Marion St. Ry. Co., 5 Am. Electl. Cas. 394, 11 Ind. App. 680, Chisholm v. Seattle El. Co., 24 Am. & Eng. R. Cas. (N. S.) 635, 67 Pac. 601.

83. Wise v. Brooklyn Heights

R. Co., 46 App. Div. (N. Y.) 246, 61 N. Y. Supp. 530; Baker v. Manhattan Ry. Co., 118 N. Y. 533, 29 St. Rep. (N. Y.) 936.

84. Schmidt v. Coney Isl., etc., R. Co., 26 App. Div. (N. Y.) 391, 49 N. Y. Supp. (83 St. Rep.) 777.

85. Seelig v. Met. St. R. Co., 18 Misc. Rep. (N. Y.) 383; Vail v. Broadway R. Co., 147 N. Y. 377, 70 St. Rep. (N. Y.) 33; Murray v. Brooklyn City R. Co., 27 id. 280, 7 N. Y. Supp. 900; Wynn v. Central Park, etc., R. Co., 133 N. Y. 575, 44 St. Rep. (N. Y.) 673. And see Cassidy v. Atlantic Ave. R. Co., 9 Misc. Rep. (N. Y.)

§ 31. *Curves and speed thereon.*—Street surface railroad corporations may construct their lines upon approved engineering plans, with such grades and curves as shall be necessary in the practical accomplishment of the purpose for which they are created, and in the operation of the cars they may, subject to the liability for the negligent injuring of the passengers or persons lawfully upon the highways with their property, run them in such a manner as to meet the requirements of transportation. In other words, it is not required that in the operation of street railway cars there shall be no swaying of the cars, nor jars or jolts; these are reasonably to be expected in the practical discharge of the duties which are assumed by the corporation in accepting its franchise, and it is the duty of passengers to take notice of the obvious fact that a car weighing from four to ten tons, running at a practical rate of speed, will be subject to the laws of applied mechanics, and will be swayed with greater or less violence in passing around curves, and will be jolted to some extent in passing over other tracks at street intersections. This does not give the street railway company a license to operate its cars without regard to the safety of passengers; it owes them the duty of carrying them in safety over its lines, provided, always, that the passenger has been guilty of no neglect contributing to the accident. For instance, if a passenger is occupying a seat in a car and voluntarily leaves that seat and steps down upon the running board of an open car, and, without taking hold of anything, relies upon his being able to keep his balance, and the car in passing

275; *Brennan v. Brooklyn Heights R. Co.*, 5 Am. Electl. Cas. 416, 12 Misc. Rep. (N. Y.) 570, 67 St. Rep. (N. Y.) 605, 33 N. Y. Supp. 852. And see *Hamilton v. Consol.*

Tract. Co. (Pa.), 50 Atl. 946. *Hooper v. United Tract. Co.*, 17 Pa. Super. Ct. 638; *Bass' Admr. v. Norfolk L. & Ry. Co. (Va.)*, 40 S. E. 100.

around a curve should throw him off, the company would not be liable, even if it were negligent in the operation of the car; and the burden of proving lack of contributory negligence is upon the plaintiff at all times. It is true, of course, if the injury happen to the passenger while occupying a seat provided by the company, the presumption of lack of contributory negligence would at once arise, but it is none the less proved by the plaintiff by establishing the facts which made it impossible for the passenger to contribute to the accident, as in the case of a collision, or the derailing of a car.<sup>86</sup> In operating cable cars it may be necessary for the car to pass a curve at a high rate of speed. The rate at which the cable runs is generally uniform, and perhaps eight or nine miles an hour; it is regulated by the revolutions of the engine, and they are controlled by a governor by which the rate of speed is fixed. When the gripman applies the grip firmly to the cable the car moves at the same rate of speed, and there is a reasonable necessity that the grip should be so applied when the car is rounding a curve, because by a slack of the grip in running on a curve there is a liability of breaking or cutting some of the wire on the outside of the cable, to be followed by the danger that the broken or cut wire may be caught in the grip so as to prevent its release and thus deny to the gripman control of the car and cause it to run away at the same speed that the cable moves. The consequences might be serious to passengers in the car and others, as well as to the property exposed to its collision in the crowded streets. No imputation of want of care can arise from the

86. Per WOODWARD, J., in Bruce v. Brooklyn Heights R. Co., 68 App. Div. (N. Y.) 242, 243. And see Babcock v. Los Angeles Tract. Co., 178 Cal. 163, 60 Pac. 780; Morrow v. Westchester El. Ry. Co., 30 Misc. Rep. (N. Y.) 694, 63 N. Y. Supp. 16; affd., 67 id. 21.

fact that the car rounds a curve at the cable's full speed; but if warning to passengers in the car was reasonably necessary for their protection or safety, it is the duty of the carrier, under such circumstances, to give them the benefit of the warning.<sup>87</sup> If the street railway carrier permits the passenger to ride on the platform of a crowded car and collects his fare, it is liable to him for an injury occasioned by running such car around the curve, without warning, at such speed that the passenger, while in the exercise of due care, has his hands wrenched from the railing and is thrown into the street.<sup>88</sup>

**§ 32. Presumption of negligence.**— When it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business,

87. Wilder v. Met. St. R. Co., 10 App. Div. (N. Y.) 364; affd., 161 N. Y. 665, 57 N. E. 1128; Hite v. Met. St. R. Co., 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262.

88. Lucas v. Met. St. Ry. Co., 56 App. Div. (N. Y.) 405, 67 N. Y. Supp. 833. And see Johnsen v. Oakland, etc., Ry. Co., 127 Cal. 608, 60 Pac. 170; Schaefer v. Union R. Co., 29 App. Div. (N. Y.) 261, 51 N. Y. Supp. (85 St. Rep.) 431; Marion St. R. Co. v. Shaffer (Ind. App.), 36 N. E. 861; Brusch v. St. Paul City R. Co., 52 Minn. 512, 55 N. W. 57; Blondel v. St. Paul City R. Co., 66 Minn. 284, 68 N. W. 1079, 6 Am. & Eng. R. Cas. (N. S.) 272; Francisco v. Troy & L. R. Co., 88 Hun (N. Y.), 464, 34 N. Y. Supp. 859, 68 St. Rep. (N. Y.) 792; Reber v. Pittsb. & B. Tract. Co., 179 Pa. St. 339, 36 Atl. 245; Lansing v. Coney Isl. & B. R. Co., 16 App. Div. (N. Y.) 146, 45 N. Y. Supp. 120; Carroll v.

People's R. Co., 60 Mo. 465, 1 Mo. App. Rep. 186; O'Toole v. Central Park, etc., R. Co., 58 Hun, (N. Y.), 609, 35 St. Rep. (N. Y.) 591, 12 N. Y. Supp. 347; Ayers v. Rochester R. Co., 156 N. Y. 104, 50 N. E. 960. In the case last cited it was said that the fact that a passenger in a street car was so violently twisted and prostrated by the motion of the car while passing around the curve as to be injured does not of itself warrant an inference that there was an excessive use of the motive power. Saffer v. D. D., etc., R. Co., 24 St. Rep. (N. Y.) 210, 5 N. Y. Supp. 700, 2 Silv. (N. Y.) 343. And see Omaha St. R. Co. v. Godola (Nebr. Sup. Ct.), 6 Am. Electl. Cas. 424; Bard v. Pa. Tract. Co., id. 444, 176 Pa. St. 97; Hollingsworth v. Cincinnati St. R. Co., 21 Ohio C. C. 536; Hastings v. Central Crosstown R. Co., 7 App. Div. (N. Y.) 313, 40 N. Y. Supp. 93.

there is a presumption of negligence which throws upon the carrier the necessity of showing that the injury was sustained without any negligence on his part; if, however, when the carrier has given such proof, doubt still exists as to its negligence, the plaintiff must fail.<sup>89</sup> This rule applies to street railroad companies operating cars by electric or steam power.<sup>90</sup> But where the agencies which, united, caused

89. McCurrie v. So. Pac. Co. (Sup.), 122 Cal. 561, 55 Pac. 324; Bassett v. Los Angeles Tract. Co., 22 Am. & Eng. R. Cas. (N. S.) 5 65 Pac. 470; Olsen v. Citizens' Ry. Co., 152 Mo. 426, 54 S. W. 470; Clark v. Railroad Co., 127 Mo. 210, 29 S. W. 1016; Hill v. Railroad Co., 109 N. Y. 239, 16 N. E. 61; Smedley v. Hestonville, M. & F. Pass. R. Co., 184 Pa. St. 620, 39 Atl. 544, 9 Am. & Eng. R. Cas. (N. S.) 649, 42 W. N. C. 169; Steele v. Consol. Tract. Co., 30 Pittsb. L. J. (N. S.) 290; Scott v. Bergen Co. Tract. Co. (N. J. L.), 48 Atl. 1118, affg. 63 N. J. L. 407, 43 Atl. 1060.

90. Bosqui v. Sutro R. Co., 131 Cal. 390, 63 Pac. 682; Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988; Felton v. Holbrook (Ky.), 56 S. W. 506; Calumet El. St. Ry. Co. v. Jennings, 83 Ill. App. 612. In Hastings v. Central Crosstown R. Co., 7 App. Div. (N. Y.) 313, 314, 40 N. Y. Supp. 93, the court say, it would be grossly unjust to extend the rule cited in the text to street railway companies, which have no exclusive control over their tracks or the roadway, but whose tracks are daily used by thousands of other vehicles and are placed in public streets

under the control of the city authorities, and in which work is constantly being done on or under the roadways and tracks.

Where a passenger on one of defendant's cars was injured because it went off a curve, and at the time the driver was looking at some boys, the railway being properly constructed, but no explanation offered for the derailment; held a question for the jury. Pollock v. Brooklyn & Crosstown R. Co., 39 St. Rep. (N. Y.) 568, 15 N. Y. Supp. 189. There being evidence that the plaintiff while boarding one of defendant's electric cars was struck in the cheek by a brake-handle which the motorman had set so as to hold the car at rest, and had then left the platform, it was held that a presumption of defendant's negligence arose which it was called upon to overcome. Gilmore v. Brooklyn H. R. Co. (N. Y.), 6 Am. Electl. Cas. 432, 6 App. Div. (N. Y.) 117. The fact, unexplained, that a stream of water entered a car window, injuring a passenger, does not raise a presumption of the carrier's negligence. Spencer v. Chicago, M. & St. P. Ry. Co. (Wis.), 81 N. W. 407. And see Bergen Co. Tract. Co. v. Demorest, 62 N. J. L. 755.

injury to a passenger, are not all within the control of the carrier, the latter's negligence cannot be inferred from the mere fact of the injury.<sup>91</sup> This does not mean, for example, that where a passenger in a street car is injured by the collision of the car with a wagon in a public street that there is not a presumption of negligence at once raised on the part of the carrier requiring it to establish that its employees were not in fact negligent in suffering the collision;<sup>92</sup> nor that when a car is started with great violence it is not a fair inference that such violence could have been the result of nothing else than the improper application of the power to move the car and negligence on the part of the railroad company.<sup>93</sup>

**§ 33. Avoidable accident.**—As was stated in section 31 of the chapter immediately preceding, if an accident could have been avoided by the carrier and did not result proximately from the contributing negligence of the passenger, a recovery for injuries sustained will not be defeated because the passenger was guilty of some negligence. While the carrier must exercise a high degree of care to safely transport and deliver its passenger, the passenger may rely somewhat upon

91. *Elwood v. Chicago City Ry.* Co., 90 Ill. 397. And see *Armstrong v. Met. St. R. Co.*, 23 App. Div. (N. Y.) 137, 48 N. Y. Supp. (82 St. Rep.) 597, affd. 165 N. Y. 641, 59 N. E. 1118; *Stevenson v. Second Ave. R. Co.*, 35 App. Div. (N. Y.) 474, 54 N. Y. Supp. (88 St. Rep.) 815.

92. *Shay v. Canton & S. Ry. Co.* (N. J.), 49 Atl. 547. And see *Anderson v. Brooklyn H. R. Co.*, 32 App. Div. (N. Y.) 266, 52 N. Y. Supp. (86 St. Rep.) 984.

93. *Grotsch v. Steinway R. Co.*,

19 App. Div. (N. Y.) 130, 45 N. Y. Supp. 1075. And see *Jonas v. Long Island R. Co.*, 21 Misc. Rep. (N. Y.) 306, 47 N. Y. Supp. 149; *Roberts v. Johnson*, 58 N. Y. 613; *Massoth v. D. & H. Canal Co.*, 64 id. 524; *Ferry v. Manhattan Ry. Co.*, 118 id. 497, 29 St. Rep. (N. Y.) 933; *Martin v. Second Ave. R. Co.*, 3 App. Div. (N. Y.) 448, 23 St. Rep. (N. Y.) 714, 38 N. Y. Supp. 220; *Black v. Third Ave. R. Co.*, 2 App. Div. (N. Y.) 387, 73 St. Rep. (N. Y.) 446, 37 N. Y. Supp. 830.

the carrier's care and is only called upon to act as a reasonable person would act under the circumstances. It follows therefore that if in an action to recover for injuries to a passenger the plaintiff does not establish freedom from negligence on his part, yet the evidence shows such an utter absence of all care and diligence on the part of the carrier as would not be excused by the passenger's negligence, the jury may determine that the carrier's negligence was equivalent to intentional mischief.<sup>94</sup> Although a person may be negligent in attempting to get on a moving street car, where the driver could have avoided injuring him by the exercise of reasonable care in stopping the car, the company will be liable for the injury.<sup>95</sup>

94. Mapes v. Union Ry. Co., 56 App. Div. (N. Y.) 508. In a case affirmed by the New York Court of Appeals, the court, at General Term, said: "Evidence having been given upon the trial tending to prove that the engine driver might, with the exercise of ordinary care, have stopped the engine and so have avoided the injury to the plaintiff, the court erred in granting a nonsuit. In such a case neither the fact that the plaintiff was wrongfully on the defendant's railroad, nor the fact that his own negligence, or that of his parents, contributed to the injury, constitutes a bar to a recovery. Neglect on the part of the person in charge of the engine to use ordinary care to avoid injuring a person on the track is, in contemplation of law, equivalent to intentional mischief. He has no more right to run over a person, lawfully or unlawfully, rightfully or wrongfully on the track, if he can, by the exercise of

ordinary care, avoid doing so, than he has to shoot him. Such a case furnishes a just and well-established exception to the general rule, that contributive negligence on the part of the plaintiff will defeat a recovery." Kenyon v. N. Y., etc., R. Co., 5 Hun (N. Y.), 479; affd., 76 N. Y. 607; citing Davies v. Mann, 10 N. W. 546; Bird v. Holbrook, 4 Bing. 628; Tuff v. Warman, 5 C. B. (N. S.) 573; Scott v. Dublin, etc., R. Co., 11 Irish C. L. 377; Button v. Hudson R. Co., 18 N. Y. 248, 258. And see Parkinson v. Concord St. Ry. (N. H.), 24 Am. & Eng. R. R. Cas. N. S. 575, 51 Atl. 268.

95. Woodward v. West Side St. R. Co., 71 Wis. 625, 38 N. W. 347. And see Willmot v. Corrigan Consol. St. R. Co., 106 Mo. 535, 17 S. W. 490; Carrico v. W. Va. C. & P. R. Co., 35 W. Va. 389, 11 Ry. & Corp. L. J. 64, 14 S. E. 12; Texas & P. R. Co. v. Overall, 82 Tex. 247, 18 S. W. 142. Where

## CONTRIBUTORY NEGLIGENCE.

**§ 34. Measure of care required of passengers.**—A passenger on a street car is not bound absolutely to exercise the highest degree of vigilance and care for his safety;<sup>96</sup> having signaled the conductor indicating a desire to alight, he is not required to exercise as high a degree of care as the conductor must exercise in regard to the movement of the car.<sup>97</sup> Thus a slight inattention to duty, not the proximate cause of the injury which resulted to him from the gross negligence of the carrier, will not defeat a recovery.<sup>98</sup> A lady upon a street car is not, as matter of law, chargeable with negligence in allowing her dress to catch upon a projecting bolt, the existence of which she knew or might have known by the exercise of ordinary care.<sup>99</sup> But a passenger cannot place herself in a position of obvious danger, and thereafter hold the carrier liable for the result of her own carelessness.<sup>1</sup> If a passenger

the jury, after retirement, sent to the presiding justice a written question, whether negligence of plaintiff would preclude his recovery without regard to the care of the motorman, and the justice replied that "if the plaintiff was not using due care, and his want of it was the cause of, or directly contributed to, the injury, he could not recover, even if the motorman was also in fault," was held objectionable because not sufficiently specific and tending to make the jury understand that whatever the circumstances, plaintiff's negligence would preclude recovery.

96. West Chicago St. R. Co. v. McNulty, 166 Ill. 203, 46 N. E. 784, affg. 64 Ill. App. 549, 1 Chic. L. J. Week. 373. And see Parkinson v. Concord St. Ry. Co. (N.

H.), 24 Am. & Eng. R. Cas. (N. S.) 575, 51 Atl. 268; Lee v. Market St. Ry. Co. (Cal.), 24 Am. & Eng. R. Cas. (N. S.) 578, 67 Pac. 765; Doolittle v. So. Ry. Co., 62 S. C. 130, 40 S. E. 133.

97. Cobb v. Lindell R. Co., 149 Mo. 135, 50 S. W. 310.

98. Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 491, 2 Am. & Eng. R. Cas. (N. S.) 248, 40 Pac. 819; Kansas & A. V. R. Co. v. White (C. C. App. 8th C.), 67 Fed. 481.

99. North Chicago St. R. Co. v. Eldridge, 151 Ill. 542, 38 N. E. 246; Chartrand v. So. R. Co., 57 Mo. App. 425; Patterson v. Inc. Plane R. Co., 12 Ohio C. C. 274, 1 O. C. D. 665.

1. Edgerton v. Balt. & Ohio R. Co. (D. C. App.), 23 Wash. L.

attempt to leave a moving car running at a high rate of speed, the attempt will be so obviously dangerous that he cannot recover for an injury occasioned thereby. It cannot be said however, as matter of law, that it is negligent to alight from a moving car. The circumstances surrounding and the speed of the car make it a question for the jury.<sup>2</sup>

Rep. 369; Chicago, etc., R. Co. v. Myers (C. C. App. 8th C.), 49 U. S. App. 279, 25 C. C. A. 486, 80 Fed. 361. So, where the passenger left his seat in an electric car, went out on the platform, leaned over to look for a fire, and was killed by hitting his head against a tree which he ought to have known was standing near the track. *Sias v. Rochester R. Co.*, 18 App. Div. (N. Y.) 506, 46 N. Y. Supp. 582. The case was tried three times, and it is reported also in 92 Hun (N. Y.), 140, 51 App. Div. (N. Y.) 618; and the last decision affirmed in 169 N. Y. 118. And see *State, Sharkey, v. Lake Roland El. R. Co.*, 84 Md. 163, 34 Atl. 1130, 28 Chic. Leg. N. 410; *Aikin v. Frankford, etc., R. Co.*, 142 Pa. St. 47, 21 Atl. 781; *Kimber v. Met. St. R. Co.*, 69 App. Div. (N. Y.) 353.

2. *Coursey v. So. Ry. Co.* (Ga.), 38 S. E. 866; *McDonald v. Mont. St. R. Co.*, 110 Ala. 161, 20 So. 317; *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Nebr. 161, 67 N. W. 8, 4 Am. & Eng. R. Cas. (N. S.) 44; *Dimmitt v. Hannibal & St. J. R. Co.*, 40 Mo. App. 654; *Merritt v. N. Y., etc., R. Co.*, 162 Mass. 326; *Chicago & A. R. Co. v. Byrum*, 153 Ill. 131; *McDonald v. Kansas City & I. R. T. R. Co.*, 127 Mo. 38; *Jones v. Balt. & O. R. Co.*,

4 App. D. C. 158; *Sweeney v. Union Tract. Co.*, 199 Pa. St. 293, 49 Atl. 66. In the case last cited it appeared that the passenger on an open street car signaled the conductor to stop, and after the latter rang the bell, and as the speed slackened, he stepped to the side and stood with one foot on the car and the other on the running board, the car not stopping, he withdrew his foot from the running board and stood just inside of the car firmly holding the handrail, and again signaled. The conductor again rang the bell, the speed slackened, the car almost stopped, and suddenly moved on more rapidly, and with a jerk which threw the passenger off. Held for the jury. And see *Foster v. Union Tract. Co.* (Pa.), 49 Atl. 270; *Britton v. Grand Rapids St. R. Co.*, 90 Mich. 159, 51 N. W. 276; *Hodges v. So. R. Co.*, 120 N. C. 555, 27 S. E. 128; *So. R. Co. v. Mitchell*, 98 Tenn. 27, 40 S. W. 72; *Nichols v. Lynn & B. R. Co.*, 168 Mass. 528, 47 N. E. 427; *Shade v. Union Tract. Co.* (C. P.), 7 Pa. Dist. Rep. 34, 20 Pa. Co. Ct. 292; *Kohler v. West Side R. Co.*, 99 Wis. 33, 74 N. W. 568; *Chicago City R. Co. v. Meehan*, 77 Ill. App. 215; *Posten v. Denver Consol. Tramway Co.*, 11 Colo. App. 187, 53 Pac. 391; *Wallace v. Third Ave.*

Neither is the passenger bound to know that the place where he does alight is safe;<sup>3</sup> nor does his failure to advise the carrier's employee of a threatened danger subject him to the charge of contributory negligence where he does not undertake management or direction.<sup>4</sup> The seats in railway cars are provided for the passengers to occupy. If, without reasonable cause, they leave the car or place themselves or any portion of their body on the outside of it when in motion they assume the hazard of so doing. If a passenger unnecessarily and voluntarily leave his seat, stand upon the step and there come in contact with a column of the elevated road in close proximity to the track, he cannot recover for injury thus occasioned.<sup>5</sup> But a street car passenger sitting beside an

R. Co., 36 App. Div. (N. Y.) 57, 5 Am. Neg. Rep. 215, 55 N. Y. Supp. 132. So held where a woman with a babe in her arms is thrown to the ground by the negligent starting of a car, although she was not holding on, and stood facing the rear. Rouser v. Wash. & G. R. Co., 26 Wash. L. Rep. 559, 13 App. D. C. 320. And see Sanders v. So. R. Co., 107 Ga. 132, 14 Am. & Eng. R. Cas. (N. S.) 281, 32 S. E. 840; Birmingham Ry. & E. Co. v. James, 121 Ala. 120, 25 So. 847. The mere act of a boy thirteen years old in unnecessarily jumping from a moving street car does not, as matter of law, amount to contributory negligence. It is otherwise however if he had been previously warned of the danger of such an act. Pueblo El. St. R. Co. v. Sherman, 25 Colo. 114, 53 Pac. 322.

3. The plaintiff, riding at night, notified defendant's conductor that he wished to leave at a certain

street, at which place there was a plank roadway some forty feet wide guarded by railings, where the cars were accustomed to stop. The car passed the street and stopped at a place where there was no protection, and where the track passed over a trestle twelve feet above the tide flats; knowing that plaintiff was going to the power-house, the conductor pointed toward it, and the former, thinking they were at the usual stopping place, stepped from the car, started toward the power-house and fell through an unprotected space between the track and the wagon road; he was held not contributorily negligent. Henry v. Grand St. El. Ry. Co. (Wash.), 64 Pac. 137.

4. Perez v. New Orleans City & L. R. Co., 47 La. 1391, 17 So. 869.

5. Coleman v. Second Ave. R. Co., 114 N. Y. 609; Cummings v. Worcester, L. & S. St. R. Co., 166 Mass. 220, 5 Am. & Eng. R. Cas.

open window, riding with his arm resting on the sill not more than three inches outside the car, is not necessarily negligent so as to preclude recovery for an injury to such arm caused by another car passing on a switch.<sup>6</sup> It depends however upon the rate of speed with which the car ordinarily travels. If it be an electric car or a cable car it might be negligent, as matter of law, for a passenger to permit his arm, or any portion of his body, to protrude beyond the line of the outside of the car. It would seem that the same rule would then apply as is applied to travelers in steam trains.<sup>7</sup> There can be no recovery for injuries sustained by a passenger on a street car platform where standing thereon is an act of carelessness, or failure to exercise such care as men of ordinary prudence would exercise under the same circumstances.<sup>8</sup> But ordinarily standing on the front or rear platform even of an electric or a cable car with the permission of the employees controlling the car is not so obviously dangerous as to prevent a recovery by a passenger who, without other fault, is injured.<sup>9</sup> A woman may stand in the aisle of a street

(N. S.) 389, 44 N. E. 126; Tanner v. Buffalo Ry. Co., 72 Hun (N. Y.), 465, 54 St. Rep. (N. Y.) 776.

6. Tucker v. Buffalo R. Co., 53 App. Div. (N. Y.) 571, 65 N. Y. Supp. 989; Sweeney v. Union Ry. Co., 31 Misc. Rep. (N. Y.) 472, 797. And see Francis v. N. Y. Steam Co., 114 N. Y. 380, affg. 13 Daly (N. Y.) 510, 1 St. Rep. (N. Y.) 261; Schneider v. New Orleans & C. R. Co. (C. C. E. D. La.), 54 Fed. 466; Gulf C. & S. F. R. Co. v. Killebrew (Tex.), 20 S. W. 182, revg. on other grounds, *id.* 1005.

7. See Carrico v. W. Va., etc., R. Co., 35 W. Va. 389, 11 Ry. & Corp. L. J. 64, 14 S. E. 12; Rich-

mond & D. R. Co. v. Scott (Va.), 52 Am. & Eng. R. Cas. 405, 16 L. R. A. 91, 14 S. E. 763, 16 Va. L. J. 362; Texas & P. R. Co. v. Overall, 82 Tex. 247, 18 S. W. 142.

8. Beal v. Lowell & B. St. R. Co., 157 Mass. 444, 32 N. E. 653.

9. Seymour v. Citizens' St. R. Co., 114 Mo. 266, 58 Am. & Eng. R. Cas. 395, 21 S. W. 739; Matz v. St. Paul City R. Co., 52 Minn. 159, 53 N. W. 1071; Cogswell v. West St. & N. E. El. R. Co., 5 Wash. 46, 52 Am. & Eng. R. Cas. 500, 31 Pac. 411, 7 Am. R. & Corp. Rep. 48; Herdt v. Rochester City & B. R. Co., 20 N. Y. Supp. 346, 48 St. Rep. (N. Y.) 46; Met. R.

car where other passengers are permitted by the company to stand in the usual manner of occupying a car after the seats are filled, and she is not negligent thereby as matter of law.<sup>10</sup> But she must be on her guard against the ordinary movements of the car though they may be sudden.<sup>11</sup> If she fail to hold on to the railings of the car while alighting, although the car is in slow motion, she may be contributorily negligent.<sup>12</sup> If one takes a position carelessly against a door which is liable to be opened at any time she is guilty of contributory negligence and cannot recover for injuries sustained by falling out of the car because the door is suddenly opened, although the employee who opens it is also negligent in not observing her position and warning her of it, and waiting for her to move.<sup>13</sup> One may be negligent in failing to obey the regulation of the carrier of which he has knowledge, or should have knowledge,<sup>14</sup> yet, if the company's employees allow, without objection, the infraction of the regulation, as where passengers were accustomed, in spite of the rule

Co. v. Snashall (D. C. App.), 22 Wash. L. Rep. 377; Noble v. St. J. & B. H. St. R. Co., 98 Mich. 249, 57 N. W. 126; Grotsch v. Steinway R. Co., 19 App. Div. (N. Y.) 130, 45 N. Y. Supp. 1075; Jackson v. Phila. Tract. Co., 182 Pa. St. 104, 37 Atl. 827; Bailey v. Tacoma Tract. Co., 16 Wash. 48, 47 Pac. 341; Fisher v. W. Va. & P. R. Co., 42 W. Va. 183, 33 L. R. A. 69, 4 Am. & Eng. R. Cas. (N. S.) 86, 24 S. E. 570; North Chicago St. R. Co. v. Williams, 140 Ill. 275, 52 Am. & Eng. R. Cas. 522, 29 N. E. 672, affg. 40 Ill. App. 590; Lehr v. Steinway & H. P. R. Co., 118 N. Y. 556, 30 St. Rep. (N. Y.) 1.

10. Griffith v. Utica & M. R. Co.,

17 N. Y. Supp. 692, 43 St. Rep. (N. Y.) 835; Ripley v. Second Ave. R. Co., 8 Misc. Rep. (N. Y.) 449, 59 St. Rep. (N. Y.) 37, 28 N. Y. Supp. 683.

11. Brennen v. Brooklyn Heights R. Co., 5 Am. Electl. Cas. 416, 12 Misc. Rep. (N. Y.) 570, 67 St. Rep. (N. Y.) 605, 33 N. Y. Supp. 852.

12. Root v. Des Moines City Ry. Co. (Iowa), 83 N. W. 904.

13. Prothero v. Citizens' R. Co., 134 Ind. 431, 33 N. E. 765. And see Consol. Tract. Co. v. Thalheimer, 59 N. J. L. (30 Vroom) 474, 37 Atl. 132.

14. Lake Shore & M. S. R. Co. v. Kelsey, 180 Ill. 130, 54 N. E. 608.

against it, to swing around from the step of an electric car to that of the trailer and injury results from an electric shock caused by imperfect insulation, the person injured will not be held negligent as matter of law.<sup>15</sup> It is not necessarily negligent for a passenger to attempt to board a car next to the parallel track and in spite of a chain across the entrance to the platform, as the chain is notice, merely, that he is liable to be struck by passing cars.<sup>16</sup> A passenger leaving a street car and required to cross the parallel tracks is not necessarily negligent, as the stopping of the car and the invitation to alight upon that side given by the company's employees may be regarded as an assurance of the absence of danger.<sup>17</sup>

**§ 35. Children.**—In entering, riding upon, and leaving street cars a boy say ten years of age is bound to exercise prudence equal to his knowledge and experience, and to that extent is held responsible in law for acts or omissions contributing to his own injury.<sup>18</sup> He is not as matter of law free from

15. *Burt v. Douglass County St. R. Co.*, 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479.

16. *Schwartz v. Cincinnati St. R. Co.*, 8 Ohio C. C. 484, 1 Ohio Dec. 197. And see *De Rozas v. Met. St. R. Co.*, 13 App. Div. (N. Y.) 296, 43 N. Y. Supp. 27; *Sexton v. Met. St. R. Co.*, 40 App. Div. (N. Y.) 26, 6 Am. Neg. Rep. 135, 57 N. Y. Supp. 577; *Dale v. Brooklyn City, etc., R. Co.*, 1 Hun (N. Y.), 146, 3 T. & C. 686; *affd.*, 60 N. Y. 638.

17. *Wise v. Brooklyn Heights R. Co.*, 46 App. Div. (N. Y.) 246, 61 N. Y. Supp. 530; *Roberts v. N. Y., etc., R. Co.*, 175 Mass. 296, 56 N. E. 559; *Gray v. Fort Pitt Tract.*

Co., 198 Pa. St. 184, 47 Atl. 945; *Houston & T. C. R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 58 S. W. 642; *Landigan v. Brooklyn Heights R. Co.*, 23 App. Div. (N. Y.) 43, 49 N. Y. Supp. 454; *Toledo Consol. St. R. Co. v. Lutterbeck*, 11 Ohio C. C. 279; *Doyle v. Albany Ry.*, 5 App. Div. 601, 39 N. Y. Supp. 440. And see for additional recent authorities as to contributory negligence, *Schneider v. Market St. Ry. Co.* (Cal.), 66 Pac. 734; *Cotton v. Lynn & B. R. (Mass.)* 61 N. E. 818.

18. *Little Rock Tract. & E. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7; *Balt. City Pass. R. Co. v. McDonnell*, 43 Md. 534; *Stone v. D.*

contributory negligence in trying to board an electric car followed by a trailer moving at a rate of from three to seven miles an hour.<sup>19</sup> If he fall from the platform or car steps because of his own imprudence, the carrier is not liable merely because the conductor called him to the platform when about to reach his destination and while giving the signal to stop.<sup>20</sup> But it may be said, generally, that the carrier ought to prevent children of such tender years that negligence cannot be imputed to them from being on the platform of a moving car, and if such a child gets there without permission the carrier's failure to remove him from his position of danger as soon as discovered is negligence.<sup>21</sup> The carrier is responsible if such a child jump from the car after the conductor has refused to stop at a usual stopping place to allow him to reach his home, although none of the servants

D., etc., Ry. Co., 115 N. Y. 104, 23 St. Rep. (N. Y.) 551; Phila. City Pass. Ry. Co. v. Hassard, 75 Pa. St. 367.

19. Shy v. Union Depot R. Co., 134 Mo. 681, 36 S. W. 235; Chicago City Ry. Co. v. Wilcox (Ill.), 24 N. E. 419, 8 L. R. A. 494; Erie City Pass. Ry. Co. v. Schuester, 113 Pa. St. 412, 6 Atl. 269; Mowrey v. Central City Ry. Co., 66 Barb. (N. Y.) 43. In a recent case in New York it appeared that a boy of six years boarded a street car, and by reason of its being crowded was obliged to stand with one foot on the front platform and the other on the step; after the car started, the conductor running alongside collected fares; the boy gave him his ticket and the conductor then attempted to board the platform by forcing himself between the boy and another passenger; in so doing

he elbowed the boy, who fell or was pushed from the car and injured. It was held that the questions of negligence and contributory negligence were for the jury. Gray v. Met. St. R. Co., 39 App. Div. (N. Y.) 536, 57 N. Y. Supp. (91 St. Rep.) 587. Where a boy over seven years of age on an ocean steamship attempted to follow his father and was crowded against the rudder chain by a throng of other passengers assembled by the captain's orders; held a question for the jury as to whether or not a recovery could be had against the carrier for negligence. Garoni v. Compagnie Nationale de Navigation, 39 St. Rep. (N. Y.) 63, 14 N. Y. Supp. 797; affd., 131 N. Y. 614.

20. Cronan v. Crescent City R. Co., 49 La. Ann. 65, 21 So. 163.

21. Levin v. Second Ave. Tract. Co. (Pa.), 50 Atl. 225.

of the carrier were in a position to prevent the jump.<sup>22</sup> How much of experience and what degree of intelligence a child must evince before negligence can be imputed to him can never be determined as a matter of law. The age, the person, the circumstances surrounding are all to be given, and the jury must decide.<sup>23</sup>

**§ 36. Infirm persons.**— A carrier does not owe to every passenger precisely the same care without respect to age, sex,

22. *Avey v. Galveston, H. & S. A. R. Co.*, 81 Tex. 243, 26 Am. St. Rep. 809, 16 S. W. 1015.

23. The cases upholding the doctrine stated in the text are numerous, and many of them have been heretofore cited. See also *Barksdull v. New Orleans & Carrollton R. Co.*, 23 La. Ann. 180; *McMahon v. Northern Central Ry. Co.*, 39 Md. 438; *Hestonville Pass. Ry. Co. v. Connell*, 88 Pa. St. 520; *Oldfield v. N. Y. & H. R. Co.*, 3 E. D. Smith (N. Y.), 103; affd., 14 N. Y. 310; *Washington & Georgetown Ry. Co. v. Gladmon*, 15 Wall. (U. S.) 401; *Brown v. European & N. A. Ry. Co.*, 58 Me. 384; *Nagle v. Allegheny V. R. Co.*, 88 Pa. St. 35; *St. Claire St. Ry. Co. v. Eadie*, 43 Ohio St. 91, 54 Am. Rep. 144; *Westerfield v. Levis*, 43 La. Ann. 63, 9 So. 52; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Farris v. Cass Ave., etc., Ry. Co.*, 80 Mo. 325. For additional authorities as to the care required on the part of street railroad employees with reference to children, see *Reed v. Minneapolis St. R. Co.*, 34 Minn. 557, 27 N. W. 77; *Pendril v. Second Ave. R. Co.*, 43 How. Pr. (N. Y.) 599; *Mallard v. Ninth Ave.*

R. Co., 15 Daly (N. Y.), 376; 27 St. Rep. 801; *Citizens' St. R. Co. v. Carey*, 56 Ind. 396; *Dallas City R. Co. v. Beeman*, 74 Tex. 291, 11 S. W. 1102; *Chicago W. D. R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, 23 N. E. 385; *Tallaher v. Crescent City R. Co.*, 37 La. Ann. 288; *Hearn v. St. Charles St. R. Co.*, 34 id. 160; *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 40 Am. & Eng. R. Cas. 261, 12 S. W. 652, 6 L. R. A. 536; *Mascheck v. St. Louis R. Co.*, 71 Mo. 276, 2 Am. & Eng. R. Cas. 38; *Bulger v. Albany Ry.*, 42 N. Y. 459; *Jaquinto v. Broadway & S. A. R. Co.*, 49 St. Rep. (N. Y.) 627, 21 N. Y. Supp. 639, 2 Misc. Rep. (N. Y.) 174; *Wolf v. Houston*, etc., R. Co., 50 Hun (N. Y.), 603, 19 St. Rep. (N. Y.) 763, 2 N. Y. Supp. 787; *Nelson v. Crescent City R. Co. (La.)*, 7 Am. & Eng. R. Cas. (N. S.) 192; *Anderson v. Minneapolis St. R. Co.*, 42 Minn. 490, 43 Am. & Eng. R. Cas. 294, 44 N. W. 518; *Collins v. S. Boston H. R. Co.*, 142 Mass. 301, 7 N. E. 856, 26 Am. & Eng. R. Cas. 371; *Jones v. United Tract. Co. (Pa. Sup.)*, 24 Am. & Eng. R. Cas. (N. S.) 395, 50 Atl. 826; *Nolder*

or bodily infirmity.<sup>24</sup> If he be evidently crippled, or infirm, or very young, the duty of the carrier toward him while boarding or alighting, or while remaining in the car must be performed with due regard to such apparent condition.<sup>25</sup> Knowledge communicated to one employee upon a car that a passenger is feeble and will need assistance in getting off is notice to the carrier; and it is not necessary to notify the conductor or the one in charge of the car;<sup>26</sup> and a conversation which plaintiff had with the conductor on entering the car is competent to show that he knew that the plaintiff was a cripple.<sup>27</sup> Where an elderly man requested a street car

v. McKeesport, W. & D. Ry. Co.,  
24 Am. & Eng. R. Cas. (N. S.) 396,  
50 Atl. 948.

24. St. Louis, A. & T. R. Co. v.  
Finlay, 79 Tex. 85, 15 S. W. 266;  
Schiller v. D. D., etc., R. Co., 26  
Misc. Rep. (N. Y.) 392, 56 N. Y.  
Supp. (90 St. Rep.) 184.

25. Ridenhour v. Kansas City  
Cable R. Co., 102 Mo. 283, 14 S.  
W. 760; Sheridan v. Brooklyn & N.  
R. Co., 36 N. Y. 39, 34 How. Pr.  
(N. Y.) 217. A passenger being sud-  
denly ill and thereby less able to  
look after his own safety, who  
makes that fact known to the con-  
ductor, is entitled to a greater de-  
gree of care than is demanded un-  
der ordinary circumstances. McCann  
v. Newark & So. R. Co., 58  
N. J. L. (29 Vroom) 642, 34 Atl.  
1052, 4 Am. & Eng. R. Cas. 382, 33  
L. R. A. 127. And see Indianap-  
olis, P. & C. R. Co. v. Pitzer,  
109 Ind. 179; East Line & R. Co. v.  
Rushing, 69 Tex. 306, 6 S. W. 834;  
Shenandoah Val. R. Co. v. Moose,  
83 Va. 827, 3 S. E. 796; Lake Shore  
& M. S. R. Co. v. Salzman, 52 Ohio

St. 558, 31 L. R. A. 261; Atchison,  
T. & S. F. R. Co. v. Weber, 33  
Kan. 543; Louisville, N. & G. S. R.  
Co. v. Fleming, 14 Lea (Tenn.),  
128; Columbus, C. & I. C. R. Co.  
v. Powell, 40 Ind. 37.

26. Foss v. Boston & M. R. Co.  
(N. H.), 47 Am. & Eng. R. Cas.  
566, 21 Atl. 222, 11 L. R. A. 367;  
Croom v. Chicago, M. & St. P. R.  
Co., 52 Minn. 296, 38 Am. St. Rep.  
557, 53 N. W. 1128, 18 L. R. A.  
602, 7 Am. Ry. & Corp. Rep. 468.

The carrier is not liable for the  
death of one by heart disease, who  
was rudely and roughly removed  
from the car by the driver under  
the mistaken impression that he  
was drunk, and placed on the side-  
walk where soon after he died;  
there being nothing to show that  
it was not the disease that killed  
him, or that the driver's wrongful  
acts in any manner produced or  
hastened his death. Briggs v. Min-  
neapolis, 52 Minn. 36, 53 N. W.  
1019.

27. Louisville, H. & St. L. R.  
Co. v. Bowlds (Ky.), 64 S. W. 957.

driver to stop and permit him to alight and was rudely answered, he cannot recover if he be injured in attempting to jump from the car while in slow motion without any notice to the driver of his intention, although his injury was occasioned by a sudden jerk of the car as the team drawing it were struck by a whip just as he was alighting.<sup>28</sup> The carrier is not chargeable with notice that a passenger more than fifty years of age has ridden on a cable car only once or twice and does not understand the manner of receiving and discharging passengers.<sup>29</sup> But appearance alone is no excuse for a mistake on the part of the carrier's servant; thus, if he forcibly remove from the street car one suffering from St. Vitus dance, under the mistaken notion that he is intoxicated, a rule of the company requiring conductors not to allow intoxicated persons on the car affords no protection.<sup>30</sup> It has been held that a short person weighing 200 pounds is negligent in attempting to board a street car, moving at the rate of six miles an hour, with packages in both his hands.<sup>31</sup> The rule would seem to be however that it is a question for the jury to determine whether one is negligent, however crippled or fleshy, in attempting to board a moving car.<sup>32</sup>

**§ 37. Intoxicated persons.—** The mere fact that a passenger was intoxicated at the time of his injury, while not in itself

28. *Outen v. N. & S. St. R. Co.*, 94 Ga. 662, 21 S. E. 710.      St. Rep. (N. Y.) 356, 28 N. Y. Supp. 84.

29. *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192.

30. *Regner v. G. F., etc., St. R. Co.*, 74 Hun (N. Y.), 202, 56 St. Rep. (N. Y.) 300, 26 N. Y. Supp.

625; *Watson v. Oswego St. Ry. Co.*, 7 Misc. Rep. (N. Y.) 562, 58

31. *Balt. Tract. Co. v. State, Ringgold*, 78 Md. 409, 58 Am. & Eng. R. Cas. 200, 28 Atl. 397.

32. *Cincinnati, H. & B. R. Co. v. Nolan*, 8 Ohio C. C. 347. And see *Shaughnessy v. Consol. Tract. Co.*, 17 Pa. Super. Ct. 588.

contributory negligence, is a circumstance to be considered. The jury, too, might determine that the intoxication contributed to his injury.<sup>33</sup> The self-inflicted disability does not excuse him from the exercise of the care due from a sober man.<sup>34</sup> If he act in such a manner as to justify the inference that he is intoxicated and falls into a sleep or stupor which the conductor fails to break by shaking him, he may be ejected.<sup>35</sup> But in ejecting him, due and proper regard for his safety must be had; and the carrier is not justified in putting him, on a dark and stormy night, in an unlighted road some distance from buildings but where street cars are passing in each direction and teams are likely also to be passing.<sup>36</sup> Nevertheless the carrier is not liable for the death of an intoxicated person ejected, where the conductor did not have ground to believe that the man was unable to find his way or walk to his own father's house which was not far away, or to some other suitable shelter.<sup>37</sup> So the failure of the conductor to compel a young man twenty years of age, somewhat intoxic-

33. *Trumbull v. Erickson* (U. S. C. C. A. Colo.), 97 Fed. 891, 38 C. C. A. 536.

34. *Fisher v. W. Va. & P. R. Co.*, 42 W. Va. 183, 24 S. E. 570, 4 Am. & Eng. R. Cas. (N. S.) 86, 33 L. R. A. 69; *Holland v. West End St. R. Co.*, 155 Mass. 387, 29 N. E. 622; *Donoho v. Met. St. R. Co.*, 30 Misc. Rep. (N. Y.) 433, 62 N. Y. Supp. (96 St. Rep.) 523; *Butler v. Steinway R. Co.*, 87 Hun (N. Y.), 10, 67 St. Rep. (N. Y.) 498, 33 N. Y. Supp. 845.

35. *Hudson v. Lynn & B. R. Co.* (Mass.), 59 N. E. 647; *Freedon v. N. Y. C., etc., R. Co.*, 24 App. Div. (N. Y.) 306, 48 N. Y. Supp. 584.

36. *Hudson v. Lynn & B. R. Co.* (Mass.), 59 N. E. 647; *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 19 So. 51, 31 L. R. A. 372. In the case last cited, it appeared that the passenger, known to be intoxicated and irresponsible, was ejected at a place from which he could escape only by following the roughly-ballasted railroad track and crossing cattle-guards on the one side and a bridge over a creek on the other, and he soon after was run over by another train and killed.

37. *Roseman v. Carolina C. R. Co.*, 112 N. C. 709, 34 Am. St. Rep. 524, 19 L. R. A. 327, 52 Am. & Eng. R. Cas. 638, 16 S. E. 766.

cated, to enter a car, after he had declined to do so and persisted in riding on the platform and was thrown therefrom and injured, will not render the carrier liable, if the conductor concluded he was able to care for himself, although the young man's father asked the conductor to get him in.<sup>38</sup>

**§ 38. Employees.**— The law applicable to the relation of master and servant, of course, controls the street surface railroad company in its relation to its employees. The rule that it is the duty of the employer to furnish safe machinery, tools, appliances and a safe place in and with which the employee may work is applicable. In providing these, the law does not require that degree of diligence and foresight which the insurer must exercise, but simply reasonable care and prudence, dependent upon the circumstances, for reasonable care and prudence is always a relative term. In the nature of things, what is sufficient care and foresight in one instance might be regarded as negligence in another.<sup>39</sup> The degree of care and prudence must increase in a corresponding ratio with the danger and hazard necessarily connected with the use of the appliance. So, when the legislature authorizes a corporation to use an agency of great danger to life, like electricity, and to use an uninsulated trolley wire, which is capable of

38. *Fisher v. W. Va. & P. R. Co.*, 42 W. Va. 183, 4 Am. & Eng. R. Cas. (N. S.) 86, 24 S. E. 570, 33 L. R. A. 69. And see *id.*, 39 W. Va. 366, 23 L. R. A. 758; *Missouri P. R. Co. v. Evans*, 71 Tex. 361, 1 L. R. A. 476, 9 S. W. 325; *Milliman v. N. Y. C., etc., Co.*, 66 N. Y. 642; *McClelland v. Louisville, etc., R. Co.*, 94 Ind. 276; *Illinois C. R. Co. v. Sheehan*, 29 Ill. App. 90; *Werner v. Citizens' Ry. Co.*, 81

Mo. 368; *Weeks v. New Orleans, etc., R. Co.*, 32 La. Ann. 615; *Welty v. Indianapolis & V. R. Co.*, 105 Ind. 55; *Hubbard v. Town of Mason City*, 60 Iowa, 400, East Tenn., etc., *R. Co. v. Winters*, 85 Tenn. 240. And see *Mathison v. S. I. M. R. Co.*, 72 N. Y. Supp. 974.

39. *Harroun & Fenn v. Light Co.*, 6 Am. Electl. Cas. 357, 12 App. Div. (N. Y.) 126.

communicating its deadly quality to wire or other conductor of electricity that came in contact with it, the law implies a duty to use a very high degree in the construction and operation of the appliances for the use of that agency, and holds it accountable for injury to any person due to the neglect of that duty, whether the person injured be its employee or not.<sup>40</sup> The master who puts a tool or implement into his servant's hand may procure it in several ways. He may buy it ready made of a dealer, procure it to be manufactured, or purchase the materials and manufacture it himself. Liability for an injury resulting from a defect in the materials of a tool will be determined by the same rule in each case. If the tool be purchased, the master is necessarily compelled to rely upon the dealer and manufacturer for the quality of materials used. The modern industrial system rests upon confidence in others. A railroad corporation cannot well apply tests which would impair the strength of the appliance, or perhaps destroy it altogether; hence, the materials of which its cars and engines are to be made, or the rails which form its tracks, must be tested by others upon whom the corporation must rely. Reasonable inspection however, as has been shown herein, is necessary and required. But when articles are manufactured by a process approved by use and experience and apparently properly finished and stamped, it is not usual for them to be tested again in quality, and such examinations are not generally required by law. If materials of the best quality are purchased and tools constructed from them by competent and skillful workmen, if there is nothing in the appearance of the material to indicate

40. *McAdam v. Central Ry. & El. Co.*, 6 Am. Electl. Cas. 348, 67 Conn. 445; *Lincoln St. Ry. Co. v. Cox*, 6 Am. Electl. Cas. 352, 48 Nebr. 807.

inefficiency, men in the ordinary affairs of life use them and place them in the hands of their servants, and railroad corporations are justified in so doing, and are not liable if the servant is injured by reason of a latent defect therein.<sup>41</sup> Where the danger is obvious to the employee, he assumes the risk in his contract of service. Whether it were obvious to him is ordinarily a question of fact for the jury.<sup>42</sup> He is

41. *Carlson v. P. B. Co.*, 132 N. Y. 273, 278; *Smith v. N. Y. C. etc., Co.*, 164 id. 491, 495; *Murphy v. C. I. & B. R. Co.*, 65 App. Div. (N. Y.) 546. In the case last cited it appeared that the employee, plaintiff, was injured by a defective "brook-line," into which he was engaged in passing span wires. The complaint was dismissed by the trial court and the judgment was reversed because there was no proof whatever that the manufacturer ever made any test of the brook-lines, and it did appear that he made a verbal promise that he would test them. There was also testimony that practical tests could have been made by the defendant of the brook-line in its finished form, which would have revealed the defect in question, and that the defect was not inherent in the material or construction, but was due to a leakage from the appliance. And see *Byrne v. Eastman's Co.*, 163 N. Y. 461; *Wagner v. Brooklyn Heights R. Co.*, 69 App. Div. (N. Y.) 349.

42. So held where plaintiff's intestate, a conductor on an open trolley car, while standing on the running board and in the act of registering a fare was struck by a trolley post and killed. The post was one of a few which were

placed between the up and down tracks and at irregular distances from the tracks; the one in question being only six and one-half inches and the next one ten inches from the upper edge of the running board. The intestate had run the car on that part of the road but once before, and it did not appear whether on an open or a closed car, whether or not he went on that side of the car, or that he knew the danger. *Pierce v. Camden, etc., Ry. Co.*, 6 Am. Electl. Cas. 377, 58 N. J. L. 400.

In a recent case it appeared that the plaintiff began learning the duties of a conductor in the defendant's employment two days before the accident; he had not worked on that part of the road before that morning, but on that morning he made two or more trips by the place where the accident occurred. He had acted as conductor on other roads and was familiar with the duties of the position and considered himself an experienced man. At the place of the accident the track ran along the side of the road for about 1,000 feet, and then ran in the center of the road; the post which the plaintiff struck was a trolley post, one of several along the track at that place and all about the same distance

not required to make a critical examination of appliances, or to entertain doubts as to the cars being properly equipped; and he can properly assume, unless he knows or should know otherwise, that the means provided by the employer for operating the cars are safe and sufficient. He is not bound to know that the safe operation of his car requires more assistance; but it is the duty of the employer, the carrier, to supply, not only proper and safe machinery and appliances for operating the car, but sufficient skilled help for its safe operation.<sup>43</sup> Even in the presence of a known danger, to

from the track, and they and the track had been in the same relative positions for eight or nine years. No evidence that the construction was unusual or that the posts were unusually near the track. Plaintiff testified that he knew it was common in country towns to have tracks run on one side of the road, and knew that in such cases there were posts for the trolley wire; that he did not observe whether the car was on the side of the road or in the center, and paid no attention to that fact or to the posts or poles or tracks. It did not appear that when he stepped down upon the running board that he looked to see if there were any obstructions or exercised any precaution, and it was shown that the running board on the opposite side of the car would have been entirely safe, and there was nothing requiring him to use the running board on one side rather than on the other. He was struck by a trolley post and injured. Held, that the risk was an obvious one which the plaintiff must have assumed, and that he was not in the exercise of

due care; also that in view of the fact that he had been sent out upon that portion of the road where he was when injured to learn the conditions attending its operation there, to step down on the running board as he did, without looking to see whether there was any obstruction in the way or whether it were safe to do so, was negligent. *Ladd v. Brockton St. Ry. Co.* (Mass. Sup.), 62 N. E. 730, 24 Am. & Eng. R. Cas. (N. S.) 342.

43. *Windover v. Troy City Ry. Co.*, 6 Am. Electl. Cas. 381, 4 App. Div. (N. Y.) 202. The action was for damages for the death of a motorman, caused by his car running away while descending a steep hill. It was claimed that the brake was defective, and that the carrier was negligent in failing to provide a sand-man to sand the tracks. It was held that there being no evidence that deceased knew that in addition to brakes and reversing the power, the use of sand was also requisite to regulate the speed of cars upon a steep hill, he cannot be held to assume the risk arising from the failure of the com-

constitute contributory negligence on the part of the employee it must be shown that he voluntarily and unnecessarily exposed himself to it, unless it is of such character that he must be presumed to have taken the risk from the very nature of the danger to which he is exposed. An electrical wire is not ordinarily such a known danger. It is wrapped with insulated tape, and it is the known duty of the carrier or the owner or user of the wire to protect it by insulation. Ordinarily such a wire gives no signal of danger. If danger there be, it is hidden and silent and cannot be apprehended by any one of the senses in time to prevent injury.<sup>44</sup> If a brakeman is swept from the top of a car where he was in the line of his duty, without negligence on his part, by contact with a telephone wire suspended too low over the car, the carrier employing him and the telephone company controlling the wire are jointly liable to him for the injury occasioned thereby.<sup>45</sup> It is the duty, too, of the carrier to instruct its employee in the management of the appliance, and a failure to do so may make it liable for injuries sustained, and which might have been avoided had the employee injured been properly instructed.<sup>46</sup> The railroad company cannot relieve itself from the duty of furnishing adequate brakes for its cars and keeping them in order, by directing its servants so to do; and if a servant be injured it cannot shield itself from liability to him on the ground that it was the duty of a fellow servant to furnish and keep in order the appliance.<sup>47</sup> The

pany to employ a sand-man. And see Cook v. St. Paul, etc., R. Co., 34 Minn. 45; Flike v. Boston, etc., R. Co., 53 N. Y. 549; Whittaker v. D. & H. R. Co., 126 id. 544.

44. Clements v. La. El. L. Co., 4 Am. Electl. Cas. 381, 44 La. Ann. 692.

45. S. W. Tel. & Telephone Co. v. Crank, 4 Am. Electl. Cas. 392, 27 S. W. 38.

46. Sullivan v. Met. St. Ry. Co., 53 App. Div. (N. Y.) 89, 65 N. Y. Supp. (99 St. Rep.) 842.

47. McNamara v. Brooklyn City R. Co., 11 Misc. Rep. (N. Y.) 667,

servant, in the performance of a duty which he cannot perform without assistance, has authority, from the necessity of the case, to employ help; and in doing so acts in the place of the master; and such relation continues to exist during the continuance of the employment; and the master is liable for any injury sustained by the assistant from the negligence of the one employing him during that time.<sup>48</sup> Some of the States by statute require street car companies to provide screens to protect the employees stationed on the front platform from wind and storm. In Missouri, such a statute enacting also a fine for noncompliance with the requirement, part of which should be given to the prosecuting attorney, was held unconstitutional as to that part of the statute allowing the prosecuting attorney to participate in the fine; but that otherwise it was valid legislation.<sup>49</sup>

32 N. Y. Supp. 913, 66 St. Rep. (N. Y.) 361. If it require the drivers of horse cars to examine the harness, it is not rendered responsible for the consequences to such drivers of any defects which might, with reasonable care, be found on such examination as they were given opportunity to make. If however it appears that the horses are brought to the drivers ready harnessed, and a driver is injured by the breaking of a hame strap, the question of his contributory negligence is for the jury. *McKnight v. Brooklyn, etc., R. Co.*, 23 Misc. Rep. (N. Y.) 527, 51 N. Y. Supp. (85 St. Rep.) 738. Where the driver is thrown from a horse car by an open switch, and killed, and there is no proof that the car or track was out of order, a recovery cannot be had. *Donnelly v. N.*

Y., etc., R. Co.

3 App. Div. (N. Y.) 408, 38 N. Y. Supp. 709, 74 St. Rep. (N. Y.) 169.

48. *Marks v. Rochester R. Co.*, 77 Hun (N. Y.), 77, 59 St. Rep. (N. Y.) 849, 28 N. Y. Supp. 314.

49. *State v. Whittaker*, 7 Am. Electl. Cas. 806, 160 Mo. 59. The case cited was a criminal action, and the information ran against the president and general manager of an electric railway company and charged, not the defendants, but the company itself, with the unlawful ownership and operation of cars without screens. The information was held fatally defective, and judgment of conviction reversed. As to the constitutionality of such a statute, see *Minnesota v. Hoskins*, 5 Am. Electl. Cas. 614, 58 Minn. 35; *Ohio v. Nelson*, 5 Am. Electl. Cas. 619, 52 Ohio St. 88.

## PLEADING AND PRACTICE.

**§ 39. Pleading.**—Once the relation of carrier and passenger is entered upon, the carrier is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken toward the passenger.<sup>50</sup> And the injured passenger may proceed against the company for a breach of its contract to safely carry him to, and deliver him at, his destination; or he may seek to recover damages against it in an action sounding in tort, either for an unwarranted assault or for negligence.<sup>51</sup> In an action to recover damages, if special damages be claimed, they must be pleaded. The pleading however in this particular may be somewhat general. Under a complaint in which it is alleged that the plaintiff "sustained serious and lasting bodily injuries and injuries to his head, limbs, and nervous system, as well as internal injuries," testimony of impaired eyesight and hearing resulting from the injury to the head is admissible.<sup>52</sup> In an action based upon the relation of carrier and passenger, it is not sufficient in the complaint to aver that plaintiff boarded a car with the intention of becoming a passenger;<sup>53</sup> it must also be alleged in the pleading

50. Palmeri v. M. R. Co., 133 N. Y. 261, 265; Steamboat Co. v. Brockett, 121 U. S. 637, 30 L. Ed. 1039; Balt., etc., R. Co. v. Barger, 80 Md. 31, 45 Am. St. Rep. 322, 30 Atl. 561, 26 L. R. A. 222; Haver v. Central R. Co., 62 N. J. L. 286, 41 Atl. 917, 43 L. R. A. 85; Norfolk, etc., R. Co. v. Anderson, 90 Va. 6, 44 Am. St. Rep. 886, 17 S. E. 759.

51. Jacksonville St. R. Co. v

Chappell, 22 Fla. 616; Balt. City Pass. Ry. Co. v. Kemp, 61 Md. 74, 619; D., L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178; Sub. R. Co. v. Brauss, 70 Ga. 368; Webber v. Herkimer & M. St. R. Co., 35 Hun (N. Y.), 44.

52. Mullady v. Brooklyn Heights R. Co., 65 App. Div. (N. Y.) 549.

53. Raming v. Met. St. Ry. Co., 157 Mo. 477, 57 S. W. 268.

that the plaintiff was free from negligence contributing to the injury; or rather that the acts alleged of the defendant were the sole and proximate cause of the injury. So, a complaint in an action for the ejection of a passenger from a train by third persons, which alleged that the act was done in full view of defendant's employees in charge thereof, and that they made no effort to protect him or prevent the assault and battery, charges the defendant with actionable negligence, but is insufficient since it does not appear therefrom that plaintiff was free from fault at the particular time when the injury occurred. Freedom from contributory negligence must be alleged, or facts must be alleged which amount thereto.<sup>54</sup> In an action, the gravamen of which is

54. Lake Erie, etc., R. Co. v. Arnold (Ind.), 59 N. E. 394; Railroad Co. v. Hancock, 15 Ind. App. 104, 43 N. E. 609. So a complaint which alleged that the plaintiff signaled the motorman of the defendant's car, which he desired to board; that its speed was gradually slackened so that when it reached the place where plaintiff was standing it was running very slowly, and he thereupon took hold of the handrail of the car and attempted to step on the car; that suddenly the motorman, negligently and carelessly, started the car without any warning or notice, and without any fault or negligence on plaintiff's part, thereby throwing him to the ground and causing the injuries described, was held demurable as not alleging that plaintiff was free from contributory negligence, since it did not allege that he was without fault in attempting to board the car while it was moving, even though slower, and that

he was free from negligence in the manner in which he took hold of the handrail. Citizens' St. R. Co. v. Wagner (Ind. App.), 57 N. E. 49. And see Railroad Co. v. Simmons, 38 Ill. 242; Railroad Co. v. Burdge, 94 Ind. 46; Wahl v. Shoulders, 14 Ind. App. 665, 43 N. E. 458; Coal Co. v. Fullbright, 7 Ohio L. J. 187; Potter v. Railroad Co., 20 Wis. 533, 91 Am. Dec. 444; West Chicago St. Ry. Co. v. Marks, 182 Ill. 15, 55 N. E. 67. But see Citizens' St. Ry. Co. v. Huffer (Ind. App.), 60 N. E. 316. In some jurisdictions contributive negligence is a defense and must be alleged in the plea or answer. Brown v. Louisville Ry. Co. (Ky.), 53 S. W. 1041; Kennedy v. So. Ry. Co. (S. C.), 38 S. E. 169; Smiley v. St. L. & H. Ry. Co. (Mo.), 61 S. W. 667. In the Brown Case, *supra*, it was held that an averment in the petition that plaintiff was injured by the gross negligence of defendant's street railway company in failing to

the negligence of the defendant, the plaintiff should allege substantially in his pleading that the injury was caused solely by the negligence of the defendant. If he set out a specific act of negligence without any general allegation, he cannot avail himself of the general rule that the passenger is only obliged to allege generally and then prove the relation of passenger and carrier and the injury to make adequate *prima facie* cause, and that the burden then shifts to the carrier to exonerate himself, according to the practice in Missouri.<sup>55</sup> Where the complaint alleged, in an action by a passenger to recover for injuries sustained while attempting to alight from a street car, that the car had stopped for the purpose of permitting him to leave it, but was suddenly started while he was endeavoring to alight and his proof tended to show that his car did not stop entirely, the court might, in order to conform the pleadings to the proof, permit the plaintiff to amend the complaint by alleging that the car had "nearly stopped" when plaintiff attempted to alight.<sup>56</sup> In an action brought in the Municipal Court of the city of New York, where the pleadings are oral, it will be presumed rather that

have a conductor on its car, was not equivalent to an averment that it was necessary to have a conductor on the car for the safe transportation of passengers, and was not sufficient to raise an issue of fact as to the necessity of having a conductor.

55. *Feeary v. Met. St. Ry. Co.* (Mo.), 62 S. W. 452. Under a general allegation of negligence, it is error to admit testimony as to the general condition of the tracks of defendant's railway. *Miller v. St. Louis R. Co.*, 5 Mo. App. 471. And see *Brooklyn St. R. Co. v. Kelly*, 6 Ohio C. C. 155; *San An-*

*tonio St. Ry. Co. v. Caillouette*, 79 Tex. 341, 15 S. W. 390; *N. Chicago St. Ry. Co. v. Cotton*, 29 N. E. 899; *Highland Ave. & Belt R. Co. v. Wynn*, 93 Ala. 306, 9 So. 509.

56. *Rosenberg v. Third Ave. R. Co.*, 47 App. Div. (N. Y.) 323, 61 N. Y. Supp. (95 St. Rep.) 1052; affd., 168 N. Y. 681, 61 N. E. 1151. And see *Savage v. Third Ave. R. Co.*, 29 App. Div. (N. Y.) 556, 51 N. Y. Supp. (85 St. Rep.) 1066; *Patterson v. Westchester El. R. Co.*, 26 App. Div. (N. Y.) 336, 49 N. Y. Supp. (83 St. Rep.) 796.

the action is to recover damages for personal injuries growing out of the defendant's neglect to fulfill the duty of protection which it owed to the plaintiff, since the court has not jurisdiction of an action for an assault.<sup>57</sup>

**§ 40. Burden of proof.**— It is not necessary to prove every act of negligence charged. It is sufficient if a fair preponderance of the evidence show the defendant negligent in any respect charged, and that the injury was the proximate cause of such negligence, if it also appear that plaintiff did not contribute to the injury.<sup>58</sup> The plaintiff having the burden of proof, if the preponderance of the evidence be against him, a verdict in his favor will not be sustained. Thus, if it be claimed that his injuries were received in falling from a street car and the fall was caused by a sudden movement forward of the car, and it appeared that the plaintiff stepped to the rear platform and from it sought to step down to the pavement when he fell; that the car was in good condition and the conductor in his proper place on the platform, and the motorman testified that there was no attempt to start the car at the time the accident happened,

57. Hart v. Met. St. R. Co., 65 App. Div. (N. Y.) 493. Under an allegation in a complaint to recover for personal injuries, after setting forth the injuries, that "some of the said injuries are permanent," the defendant is entitled to a bill of particulars stating which are claimed to be permanent. Cavanagh v. Met. St. Ry. Co., 70 App. Div. (N. Y.) 1. But under the allegation in a complaint that "the plaintiff was injured and bruised in his person and rendered sick, sore and lame," unaccom-

panied by an allegation of permanent injury, the defendant is not entitled to a bill of particulars of "the nature, location and probable duration of each and every injury alleged in the complaint, except as specifically stated therein, showing particularly how plaintiff was 'injured and bruised, and rendered sick, sore and lame.'" English v. Westchester El. Ry. Co., 69 App. Div. (N. Y.) 576.

58. Pittsb., C., C. & St. L. Co. v. Gray (Ind. App.), 59 N. E. 1000.

and he was corroborated by several witnesses, although the plaintiff was positive in his statement that the car moved causing him to fall, there is a want of sufficient testimony to maintain his claim.<sup>59</sup> On a claim by the passenger that he was injured in being thrown to the ground by a lurch of the car in passing from the main track to a switch track, he cannot recover therefor without evidence that the injury was due to some defect in the car or track, or that the speed was unusual or dangerous, or that the jar was unusual, the mere motion of the car being insufficient to show negligence.<sup>60</sup> Plaintiff's burden is not sustained if it appear that he boarded the car to sell his papers, jumped on the front end while it was moving, and after passing along the footboard to the rear, was injured by being struck by the tongue of a wagon standing on the street, where it also appeared that the car was moving at a moderate rate and the motorman looking forward and plaintiff's presence upon the car was forbidden.<sup>61</sup> Where it appeared that plaintiff, a woman weighing more than 200 pounds, claimed to have tripped over something on the rear platform of the car as she was about to alight and was prevented from holding to the handrail by the number of passengers, the conductor, being in the middle of the car, did not assist her to alight, it was held that the evidence was not sufficient to show negligence of the defendant.<sup>62</sup> Evidence that a street car moving upon a crowded street at the rate of about two miles an hour is suddenly stopped, throwing the plaintiff from her seat in the car to the floor, and that the gripman in charge did

59. *Gretzner v. New Orleans & C. R. Co. (La.)*, 29 So. 496.

60. *Byron v. Lynn & B. R. Co.*, 177 Mass. 303, 58 N. E. 1015.

61. *Padgett v. Moll*, 159 Mo. 143, 66 S. W. 121.

62. *Jacobs v. West End St. Ry. Co. (Mass.)*, 59 N. E. 639.

not stop it, is insufficient to support a finding of negligence in the operation of the car.<sup>63</sup> It may be generally stated that where an accident occurs upon the railroad and a passenger is injured by means thereof, a *prima facie* cause of negligence is made out, but when all the circumstances proved show that defendant was without fault, or where the preponderance of the testimony is sufficient to overcome the presumption of the defendant's negligence, a verdict against it cannot be sustained.<sup>64</sup> The rule in many States is that the plaintiff must show that no negligence of his own contributed to the injury.<sup>65</sup> The United States Supreme Court however has held that, irrespective of statute law, the burden of proving contributory negligence rests on the defendant.<sup>66</sup> This is the rule in perhaps a majority of the States.<sup>67</sup>

63. Hoffman v. Third Ave. R. Co., 45 App. Div. (N. Y.) 586, 61 N. Y. Supp. 590.

64. Heggeman v. Western R. Corp., 16 Barb. (N. Y.) 353; affd., 13 N. Y. 9; Murphy v. C. I. & B. R. Co., 36 Hun (N. Y.), 199; Hitchcock v. Brooklyn City R. Co., 8 St. Rep. (N. Y.) 848; Holbrook v. Utica & S. R. Co., 12 N. Y. 236; Wynn v. Central Park, etc., R. Co., 133 id. 575; Brignoli v. Chicago & G. E. Ry. Co., 4 Daly (N. Y.), 182; Heinz v. Brooklyn Heights R. Co., 91 Hun (N. Y.), 640, 71 St. Rep. (N. Y.) 673, 36 N. Y. Supp. 675.

65. Park v. O'Brien, 23 Conn. 339; Prather v. Richmond, etc., R. Co., 80 Ga. 427, 9 S. E. 530; Cincinnati, etc., R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287; Mo. Furnace Co. v. Avend, 107 Ill. 44, 47 Am. Rep. 425; Bonce v. Du-

bueque St. Ry. Co., 53 Iowa, 278; Lesan v. Me. Central R. Co., 77 Me. 85; Taylor v. Carew Mfg. Co., 143 Mass. 470, 10 N. E. 308; Mynning v. Detroit, etc., R. Co., 67 Mich. 577; Vicksburg v. Hennessy, 54 Miss. 391; Tolman v. Syracuse, etc., R. Co., 98 N. Y. 198, 50 Am. Rep. 649; Owens v. Richmond, etc., R. Co., 88 N. C. 502.

66. Washington, etc., R. Co. v. Gladmon, 82 U. S. (15 Wall.) 401, 21 L. Ed. 114. The court said: "The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurrent negligence, the defendant must prove them and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plain-

**§ 41. Questions of evidence in actions for injury to passengers.**

— Where a disinterested witness, in no way discredited, testifies to a fact within his own knowledge and not in itself improbable or in conflict with other evidence, what he testified to is to be regarded in law as established, so that it

tiff;" citing Oldfield v. N. Y., etc., R. Co., 3 E. D. Smith, 103; affd., 14 N. Y. 310; Johnson v. H. R. R. Co., 20 id. 65; Button v. same, 18 id. 248; Wilds v. same, 24 id. 430; and quoting also Judge DENIO in the last citation as follows: "I am of opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affairs as it stands upon the undisputed facts. Thus, if a carriage be driven furiously upon a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required." \* \* \* "The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to

take care of themselves and keep out of difficulty may properly be taken into consideration." And see Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 298, 23 L. Ed. 900; Hough v. Railway Co., 100 U. S. 226, 25 L. Ed. 618; Coasting Co. v. Tolson, 139 U. S. 557, 35 L. Ed. 274, 11 Sup. Ct. Rep. 655; Mobile & Mont. R. Co. v. Jay, 65 Ala. 113; Thompson v. Duncan, 70 id. 334; W. U. T. Co. v. Eyser, 2 Colo. 154, 166; Texas, etc., Ry. Co. v. Orr, 46 Ark. 194; Sanders v. Reister, 1 Dak. 172, 46 N. W. 685; Hopkins v. Utah N. Ry. Co., 2 Idaho, 280, 13 Pac. 345; Kansas City, etc., R. Co. v. Phillipert, 25 Kan. 586; Paducah, etc., Ry. Co. v. Hoehl, 12 Bush (Ky.), 47; Frech v. Phila., etc., R. Co., 39 Md. 576; Davis v. Kansas City Ry. Co., 46 Mo. App. 189; Higby v. Gilmer, 3 Mont. 97; Lincoln v. Walker, 18 Nebr. 247, 20 N. W. 114; Cox v. Norfolk, etc., R. Co., 123 N. C. 613, 31 S. E. 851; Gram v. Northern, etc., R. Co., 1 N. Dak. 260, 46 N. W. 974; Cassidy v. Angel, 12 R. I. 449, 34 Am. Rep. 691; Smith v. Chicago, etc., Ry. Co., 4 S. Dak. 80, 55 N. W. 720; Reddon v. Union Pac. Ry. Co., 5 Utah, 355, 15 Pac. 265; Balt., etc., R. Co. v. Whittington, 30 Gratt. (Va.) 809; Norfolk, etc., R. Co. v. Burge, 84 Va. 70, 4 S. E. 25; Northern, etc., R. Co. v. O'Brien, 1 Wash. 607, 21 Pac. 35; Sheff v. Huntington, 16 W. Va.

cannot be ignored either by the court or the jury.<sup>67</sup> But where the witness is the person to whose fault or negligence an injury suffered is imputed, and seeks to exonerate himself by his own testimony, he is an interested party and his credibility is for the jury.<sup>68</sup> An exclamation by a witness

317; Hulehan v. Green Bay, etc., R. Co., 68 Wis. 527, 32 N. W. 532; McDougal v. Central R. Co., 63 Cal. 431; Hobson v. New Mexico & A. R. Co. (Arizona), 11 Pac. 541; Ky. Central R. Co. v. Thomas, 79 Ky. 160; Hocum v. Weitherick, 22 Minn. 152; Smith v. Eastern R. Co., 35 N. H. 356; N. J. Express Co. v. Nichols, 33 N. J. L. 434; Balt., etc., R. Co. v. Whitacre, 35 Ohio St. 627; Grant v. Baker, 12 Oreg. 329; Bradwell v. Pittsb. West End Pass. Ry. Co., 139 Pa. St. 404; Carter v. Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754; Hill v. New Haven, 37 Vt. 501; Indianapolis St. Ry. Co. v. Robinson (Ind.), 61 N. E. 936. Where it is claimed that the death of plaintiff's intestate resulted from serious injuries sustained in consequence of defendant's negligence, and it is proved that a short time after the accident he developed progressive muscular atrophy, but that the immediate cause of his decease was acute pulmonary tuberculosis, a germ disease in no way connected with the accident or shown to have resulted from the muscular atrophy, a finding that the tuberculosis resulted from the accident will not be sustained upon the theory, unsupported by any evidence, that the intestate was so weakened by his injuries and the muscular atrophy resulting therefrom, that it made him sus-

ceptible to tuberculosis, and therefore he contracted the latter disease. Hoey v. Met. St. R. Co., 70 App. Div. (N. Y.) 60.

67. Kavanagh v. Wilson, 70 N. Y. 179.

68. Hoes v. Third Ave. R. Co., 5 App. Div. (N. Y.) 154; Schmitt v. Met. L. Ins. Co., 13 id. 122; Wohlfahrt v. Beckert, 92 N. Y. 490. In a recent case it was held that it was error for the court to instruct the jury that if they believed the testimony of the passenger — (who had testified in an action for personal injuries claimed to have been sustained by plaintiff while alighting from the rear platform of a car, in consequence of a premature signal to start the train, that he saw the plaintiff leave the car and heard the gate slam, and that through a side window he saw the plaintiff disappear after the train had moved, and after the gate was shut, although he did not testify that he saw the guard close the gate, and the guard testified that before the plaintiff reached the gate on the rear platform of the fourth car the gate on the front platform of the fifth car had been closed, and that the plaintiff left the car in safety, and the accident resulted from his slipping on the platform) — they should find for the defendant — for the reason that if they did not believe the testimony of the guard, who was

seeing an accident from a distance is no part of the *res gestae*.<sup>69</sup> In an action because of injuries to a passenger on a car by the breaking of a trolley wire, it was held proper to prove, for the purpose of charging the company with notice of its unsafe condition, that the same wire had broken frequently during the same season.<sup>70</sup> To prove that injuries were the cause of a certain accident, testimony was given by the plaintiff's sister to the effect that she found the plaintiff's back, immediately after the accident, black and blue; that she applied the liniment prescribed by a physician for a period of two months; and the physician testified that the plaintiff's head was injured by a scalp wound which required four stitches, and that she was bruised and shaken up and began to suffer from headache soon afterward.<sup>71</sup> Evidence as to the improper construction of a car step is not admissible under an allegation that the motorman negligently released the brake as plaintiff was attempting to board the car and thus caused her injury.<sup>72</sup> When the petition in an action

an interested witness, that the gate on the front platform of the fifth car had been closed before the plaintiff attempted to leave the car, they might find that the gate which the disinterested passenger heard close was the gate on the front platform of the fifth car. *Fox v. Manhattan Ry. Co.*, 67 App. Div. (N. Y.) 460.

69. *Ehrhard v. Met. St. R. Co.*, 69 App. Div. (N. Y.) 124. In the case cited, an action to recover damages resulting from the death of plaintiff's intestate killed by falling or being thrown from defendant's street car, a serious question arose as to whether the man who claimed to have seen the accident

from the window of his residence actually did see it; and his wife testified that at the time the accident happened her husband, while standing or sitting at the window, suddenly uttered a cry and said: "Oh, I have seen a woman thrown from a car."

70. *Richmond Ry. & El. Co. v. Bowles*, 6 Am. Electl. Cas. 449, 92 Va. 738.

71. *Lindemann v. Brooklyn Heights R. Co.*, 69 App. Div. (N. Y.) 442. And see *Saumby v. Rochester*, 145 N. Y. 81; *Hamel v. B. H. R. Co.*, 59 App. Div. (N. Y.) 135.

72. *Hansberger v. Sedalia El. Ry. & P. Co.*, 82 Mo. App. 566.

against the street railway company for injuring a newsboy alleged that the gripman pushed plaintiff from the car, and the evidence showed that the gripman first shoved at him with a broom and then struck at him with his hand, in neither case touching him, and that plaintiff fell from the car in dodging the threatened blow; the evidence is not according to the allegation and a demurrer thereto should be sustained.<sup>73</sup> Evidence that on the happening of the collision there was "a smash," "a severe shock," "a bang," and "a bang again," and that the passengers were thrown down or cast across the car, is sufficient to sustain a finding that the collision was severe enough to cause plaintiff's injuries, although it appeared that no panes of glass in the car were broken, and that other passengers were uninjured.<sup>74</sup> Contributive negligence, relied upon as a defense, may be negatived by the plaintiff's testimony, and the credibility of the testimony be submitted to the jury.<sup>75</sup> Where plaintiff's testimony is corroborated only in part, and that by but one witness, and six disinterested witnesses testified in contradiction thereto, the verdict for the plaintiff was set aside as contrary to the weight of evidence.<sup>76</sup> Testimony that the passenger attempted to board a street car on a dark night when a shadow was cast around the car for several feet, and fell into a ditch she could not see, which the rail-

73. *Raming v. Met. St. Ry. Co.*, 157 Mo. 477, 57 S. W. 268. And see *So. Ry. Co. v. Dyson*, 109 Ga. 103; *Wright v. Railroad Co.*, 21 R. I. 554.

74. *McCready v. Staten Isl. R. Co.*, 51 App. Div. (N. Y.) 338, 64 N. Y. Supp. 996.

75. *Choquette v. So. El. Ry. Co.*, 80 Mo. App. 515, 2 Mo. App. Rep. 655.

76. *Black v. Second Ave. R. Co.*, 44 App. Div. (N. Y.) 333, 60 N. Y. Supp. (94 St. Rep.) 631. And see *Harris v. Second Ave. R. Co.*, 48 App. Div. (N. Y.) 118, 62 N. Y. Supp. (96 St. Rep.) 562; *Heusner v. Houston, etc., Ferry Co.*, 7 'Misc. Rep. (N. Y.) 48, 57 St. Rep. (N. Y.) 528, 27 N. Y. Supp. 365.

road company should have guarded against, authorizes a finding that she was in the exercise of ordinary care.<sup>77</sup> A passenger injured by being struck by the driver's whip while riding on the driver's seat, where passengers are accustomed to ride with knowledge of the carrier, is not guilty of negligence.<sup>78</sup> A letter sent to defendant stating that plaintiff "was thrown from one of your cars" is sufficient to submit to the jury the question as to whether the accident did occur on one of defendant's cars.<sup>79</sup> It is competent to prove ex-

77. *Call v. Portsmouth, K. & Y. St. Ry.* (N. H.), 45 Atl. 405. And see *Beecher v. Long Isl. R. Co.*, 161 N. Y. 222, 55 N. E. 899.

78. *Sparks v. Citizens' Coach Co.* (N. J. C. C.), 6 N. J. L. J. 365.

79. *Demann v. Eighth Ave. R. Co.*, 10 Misc. Rep. (N. Y.) 191, 62 St. Rep. (N. Y.) 476, 30 N. Y. Supp. 926. And see *Kunzmann v. N. Y., etc., R. Co.*, 8 Misc. Rep. (N. Y.) 689, 60 St. Rep. (N. Y.) 822, 20 N. Y. Supp. 327; *Corbett v. Brooklyn, etc., R. Co.*, 84 Hun (N. Y.), 375, 65 St. Rep. (N. Y.) 872, 32 N. Y. Supp. 1141; affd., 154 N. Y. 772. In the case last cited no one witnessed the accident in which plaintiff's intestate was killed; and the only proof was that he met his death outside of the railroad train, and between one of the cars and the platform of the station; held, that there was nothing on which to predicate negligence on the part of the railroad company.

As to sufficiency of evidence as to negligence, see *Ginnon v. N. Y. & H. R. Co.*, 26 N. Y. Super. Ct. 25; *Mooney v. H. R. Co.*, 28 id. 548; *Taylor v. D. D., etc., R. Co.*, 9 St. Rep. (N. Y.) 498; *Bleier v.*

*Bushwick R. Co.*, id. 706; *Bradley v. Second Ave. R. Co.*, 90 Hun (N. Y.), 419, 70 St. Rep. (N. Y.) 622, 35 N. Y. Supp. 918; *Werle v. Long Isl. R. Co.*, 98 N. Y. 650; *Murphy v. C. I. & B. R. Co.*, 36 Hun (N. Y.), 199; *Merwin v. Manhattan Ry. Co.*, 48 id. 608; affd., 113 N. Y. 659, 16 St. Rep. (N. Y.) 20, 1 N. Y. Supp. 267, 28 W. D. 565; *De Soucey v. Manhattan R. Co.*, 39 St. Rep. (N. Y.) 79, 15 N. Y. Supp. 108; *Pollock v. Brooklyn, etc., R. Co.*, 39 St. Rep. (N. Y.) 568, 15 N. Y. Supp. 189; affd., 133 N. Y. 624; *Schapierer v. Third Ave. R. Co.*, 30 St. Rep. (N. Y.) 209, 14 N. Y. Supp. 921; *Mulvaney v. Brooklyn City R. Co.*, 1 Misc. Rep. (N. Y.) 425, 49 St. Rep. (N. Y.) 637, 21 N. Y. Supp. 427; affd., 142 N. Y. 651, 60 St. Rep. (N. Y.) 869; *O'Malley v. Met. St. Ry. Co.*, 3 App. Div. (N. Y.) 259, 73 St. Rep. (N. Y.) 613, 38 N. Y. Supp. 456; affd., 158 N. Y. 674; *Fick v. Met. St. Ry. Co.*, 26 App. Div. (N. Y.) 84, 49 N. Y. Supp. 693; *Coulahan v. Met. St. Ry. Co.*, 28 App. Div. (N. Y.) 394, 51 N. Y. Supp. 137; *Daly v. Central R. of N. J.*, 38 App. Div.

clamations indicating present suffering or pain made at the time the injuries were received, or afterward.<sup>80</sup> But declarations of past suffering are inadmissible.<sup>81</sup> Neither are declarations as to the manner or cause of an injury competent.<sup>82</sup> Declarations of the carrier's servants, part of the *res gestæ*, are competent; they must however be shown to have been made at the very time the injuries were inflicted.<sup>83</sup> Where the action was defended on the ground that plaintiff received her injuries on account of her intoxication, and it appeared that she was arraigned in court the next morning on charge of intoxication and plead guilty, but she denied

(N. Y.) 632, 57 N. Y. Supp. 44;  
Hess v. Met. St. Ry. Co., 27 Misc. Rep. (N. Y.) 823, 57 N. Y. Supp. 222.

80. Hagenlocher v. C. I. & B. R. Co., 99 N. Y. 136; Laughlin v. St. Ry. Co., 80 Mich. 154; Birmingham Union Ry. Co. v. Hale, 90 Ala. 8, 8 So. 142.

81. Roche v. Brooklyn City & N. R. Co., 105 N. Y. 294, 11 N. E. 630.

82. Chicago West. Div. Ry. Co. v. Becker, 128 Ill. 545; Augusta & S. R. Co. v. Randall, 79 Ga. 304; Perlmutter v. Highland St. Ry. Co., 121 Mass. 497; Leahy v. Cass Ave., etc., Ry. Co., 97 Mo. 165; Louisville, etc., Ry. Co. v. Buck, 116 Ind. 566, 2 L. R. A. 520.

83. Williamson v. Cambridge R. Co., 144 Mass. 148; Whittaker v. Eighth Ave. R. Co., 51 N. Y. 295; Joslin v. Grand Rapids, etc., Co., 53 Mich. 322; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 30 L. Ed. 299; Union Ins. Co. v. Smith, 124 U. S. 424, 31 L. Ed. 505, 8 Sup. Ct. Rep. 544; Pierce

v. Van Dusen, 78 Fed. 706, 47 U. S. App. 339; Emerson v. Burnett, 11 Colo. App. 88, 52 Pac. 753; First Nat. Bank v. North, 6 Dak. 141, 41 N. W. 738; Cherokee, etc., Coal Co. v. Dixon, 55 Kan. 70, 39 Pac. 694; Geary v. Stephenson, 169 Mass. 31, 47 N. E. 509; Idaho, etc., Co. v. Fireman's Fund Ins. Co., 8 Utah, 46, 29 Pac. 827, 17 L. R. A. 588; Hall v. Murdock, 119 Mich. 392, 78 N. W. 330; Bergeman v. Ind., etc., Ry., 104 Mo. 86, 15 S. W. 994; Short v. Northern Pac. E. Co., 1 N. Dak. 164, 45 N. W. 707.

A declaration by the motorman of an electric car made while the car was still on the body of one it had run down, that "I saw the child but thought I could pass it;" or, "This is a terrible thing, I saw the child but thought I could run past it,"—is admissible as part of the *res gestæ* in an action for the injury. Sample v. Consol. L. & Ry. Co. (W. Va. Sup. Ct. App.), 24 Am. & Eng. R. Cas. (N. S.) 380, 40 S. E. 597

having so plead, and the officer who escorted her to the court testified that she asked him to plead for her and he did so; held to be error not to permit him to testify as to the plea he made, or to admissions made to him by plaintiff as to her condition the night before.<sup>84</sup> In an action by a passenger for injuries suffered, there was no evidence that the defendant company owned or operated a road at the place where the plaintiff was hurt, except a map by the railroad company which designated the railroad by name, and there was no evidence as to the existence of the defendant corporation, or that it owned or operated any railroad. The engineer making the map testified that certain lines designated the street railroad tracks. The judgment in favor of the plaintiff was reversed.<sup>84a</sup> What took place in the car at the time of an accident is competent as illustrating the severity of the injury.<sup>84b</sup> In an action where it is claimed the injuries were occasioned by negligently running against a person at a street crossing and failing to check the speed of the car, it was held not error to receive testimony that the brake and controller of the car worked hard and were out of repair; the testimony however being limited to the question of the manner in which the car should have been run when approaching the place of the accident.<sup>84c</sup> An instruction in an action to recover for personal injuries resulting from a defective board in the platform at one of defendant's stations, declaring without qualification that the person injured was guilty of negligence if she stepped into the hole or on a rotten board without looking or taking any precaution to

84. *Link v. Brooklyn Heights R. Co.*, 64 App. Div. (N. Y.) 406, 72 N. Y. Supp. 75.

84a. *Citizens' St. R. Co. v. Stock-dell* (Ind.), 62 N. E. 21.

84b. *Louisville & N. R. Co. v. Crothers* (Ky.), 65 S. W. 833.

84c. *South Chicago City Ry. Co. v. Purvis*, 193 Ill. 454, 61 N. E. 1046.

ascertain the danger, is properly refused, as the situation may have been such that she could not see the hole, or the appearance of the plank may not have indicated the defect.<sup>84d</sup> An instruction that the driver of a coach was entitled to the presumption that the car which collided with him would be moved at the point of collision under a reasonable state of control so that it might be readily stopped in case of emergency to give him an opportunity to get over the tracks in safety, is proper.<sup>84e</sup>

**§ 42. Questions for jury in such cases.**—The case should be submitted to the jury where the injuries were claimed to have been sustained on alighting from a car, and plaintiff and another testified that the car had come to a full stop; that she started to put her foot on the pavement and the car started off suddenly and she was thrown down; but the conductor testified that he warned plaintiff, and there was some evidence that plaintiff and her husband stated at the time that the conductor was not to blame.<sup>85</sup> It is not error to refuse to instruct, in an action for injuries while alighting, that if plaintiff knew the car had started before he attempted to get off he was guilty of contributory negligence.<sup>86</sup> Where plaintiff was corroborated by two others in her testimony that just as she stepped from the car it started with a jerk and threw her down, and the conductor, motorman, and three others gave testimony that she alighted while the car was in motion, but some of them did not see all the transac-

84d. Indianapolis St. R. Co. v. Robinson (Ind.), 61 N. E. 936.

84e. Reilly v. Brooklyn Heights R. Co., 65 App. Div. (N. Y.) 453, 72 N. Y. Supp. 1080.

85. Willis v. Met. St. Ry. Co., 63 App. Div. (N. Y.) 332, 71 N. Y. Supp. 554.

86. Taylor v. N. Y. C., etc., R. Co., 63 App. Div. (N. Y.) 586, 71 N. Y. Supp. 884.

tion, it was held that a verdict for plaintiff was not against the evidence.<sup>87</sup> Where it appeared that plaintiff sat on the east side of a south-bound car near the rear; that a short distance south of a street intersection the car met a wagon going north on the east track in front of a north-bound car; that the wagon, to get out of the way of the car behind it, crossed to the west and collided with the rear of the south-bound car, striking and injuring the plaintiff; that the gripman of the south-bound car ran it across the intersecting street at full speed, and the wagon driver first started to cross the west track when the car was about seventy-five feet away and his wagon was so heavy that it could not be stopped at once, it was held that the question of negligence was for the jury.<sup>88</sup> Always where the testimony of the plaintiff and of the defendant in such an action is conflicting, and it is contradicted that the plaintiff was a passenger at the time he was injured, a question of fact for the jury is presented.<sup>89</sup> In Illinois, special interrogatories requested upon a material question of fact upon which the testimony was conflicting should be submitted to the jury.<sup>90</sup> Plaintiff testified that in a rush of passengers to the rear of the car she either fell off or was shoved off; held, that the case was properly submitted to the jury, though the preponderance of the evidence showed that she jumped off.<sup>91</sup> Where the

87. *Nash v. Yonkers R. Co.*, 63 App. Div. (N. Y.) 315, 71 N. Y. Supp. 594. And see *Ericius v. Brooklyn Heights R. Co.*, 63 App. Div. (N. Y.) 353, 71 N. Y. Supp. 596.

88. *Keegan v. Third Ave. R. Co.*, 34 App. Div. (N. Y.) 297, 54 N. Y. Supp. 391; affd., 165 N. Y. 622, 59 N. E. 1124.

89. *Gaffney v. St. Paul City Ry. Co.*, 81 Minn. 459, 84 N. W. 304. See *Cunningham v. D. D., etc., Co.*, 31 Misc. Rep. (N. Y.) 471, 64 N. Y. Supp. (98 St. Rep.) 350.

90. *Chicago City Ry. Co. v. Bucholz*, 90 Ill. App. 440.

91. *Choquette v. So. El. Ry. Co.*, 80 Mo. App. 515, 2 Mo. App. Rep. 655.

carrier claimed the injury to plaintiff's foot was due either to improper care and treatment after she had alighted, or to a diseased condition of the foot before; and also that the accident and plaintiff's uncontradicted evidence showed that she struck the ground with such force as to sprain and injure her ankle; held not error for the trial judge to use the word "violently" in his charge when speaking of the manner in which her foot struck the pavement on the starting of the car.<sup>92</sup> Where the injury was suffered in defendant's horse car by collision with a coal cart belonging to the co-defendants which was improperly driven upon the sidewalk to unload, and the horse, not being able to hold it, backed into the car, the driver of the latter imprudently endeavoring to pass, it was held that the verdict for the plaintiff would not be disturbed.<sup>93</sup> The case should be submitted to the jury where it simply appeared that plaintiff was riding in one of defendant's street cars, which was being driven with unusual speed, when it was struck by the pole of a truck which penetrated through the front of the car, throwing plaintiff from her seat and injuring her. It is not a natural or a reasonable inference that such an accident could happen without some carelessness on the part of the driver of the car, and the driving at an unusual rate of speed was inferentially one cause or occasion of the accident, calling for an explanation.<sup>94</sup> It is the duty of a street railroad company, in the exercise of its franchise, to offer to intending passengers a reasonable opportunity safely to board its cars.

92. McCormick v. Pittsb. & B. Tract. Co., 13 Pa. Super. Ct. 638.

93. Seidlinger v. Brooklyn City R. Co., 28 Hun (N. Y.), 503; affd., 97 N. Y. 642.

94. Hill v. Ninth Ave. R. Co., 109 N. Y. 239. And see O'Neill v. D. D., etc., R. Co., 59 N. Y. Super. Ct. 123, 36 St. Rep. (N. Y.) 934, 15 N. Y. Supp. 84; affd., 129 N. Y. 125.

But where it is claimed that an accident was occasioned by the negligence of the driver of defendant's car proceeding in a direction opposite to that which the plaintiff was boarding on a parallel track, it is the duty of the court to charge the jury that negligence cannot be predicated on anything the driver of that car did or omitted to do, since the only allegation of negligence concerning the management of that vehicle is, that the driver did not perceive when he ought to have perceived the plaintiff falling from the car that was coming down; if the driver fulfilled the duty which was incumbent upon him to keep a vigilant watch upon his team and the road ahead so as to avoid injuring any one, he performed his whole duty.<sup>95</sup> An able-bodied man seeking to board a street car must establish that there is no obstacle outside the car making it dangerous for him to get upon it. He cannot recover for personal injuries occasioned from contact with the wheel of a truck standing in the street while he was getting on the car.<sup>96</sup> When plaintiff claims that the car was stationary when she started to alight, she cannot upon the trial be allowed to shift her position and go to the jury on the theory of defendant's negligence while she was alighting, the car being in motion.<sup>97</sup>

95. Black v. Brooklyn City R. Co., 108 N. Y. 640.

96. Moylan v. Second Ave. R. Co., 125 N. Y. 583, 37 St. Rep. (N. Y.) 871.

In the following cases the defendant's negligence was held for the jury: Griffith v. Utica & M. R. Co., 43 St. Rep. (N. Y.) 835, 17 N. Y. Supp. 692; affd., 137 N. Y. 566, 50 St. Rep. (N. Y.) 933; O'Malley v. Met. St. Ry. Co., 3 App. Div. (N. Y.) 253, 73 St. Rep. (N. Y.) 613, 38 N. Y. Supp. 456;

affd., 158 N. Y. 674; Dillon v. Forty-second St., etc., R. Co., 28 App. Div. (N. Y.) 404, 51 N. Y. Supp. 145.

97. Patterson v. Westchester El. Ry. Co., 26 App. Div. (N. Y.) 336, 49 N. Y. Supp. 796; Payne v. Nashville, etc., Ry. Co., 106 Tenn. 167, 61 S. W. 86; Kuhlman v. Met. St. R. Co., 30 Misc. Rep. (N. Y.) 417, 62 N. Y. Supp. (96 St. Rep.) 466; Schulz v. Second Ave. R. Co., 12 App. Div. (N. Y.) 445, 42 N. Y. Supp. (76 St. Rep.) 710.

§ 43. **Instructions to jury in such cases.**—Where there is evidence in an action for injuries received by a passenger getting off a street car that he had stepped from the car before its speed was increased, it is error to instruct that the injury was caused by such increase of speed.<sup>98</sup> It is improper to charge in an action wherein it is claimed the injuries resulted from being thrown from the step of a street car while the passenger attempted to alight, that a passenger on a street car has a right to alight therefrom at any time he or she may desire if the car is stopped for any purpose whatever, without giving any signal; such instruction is abstract and lacking in applicability to the facts.<sup>99</sup> Where the action is based on evidence of the negligence of the conductor of the car in stopping it to adjust the trolley after it had been thrown off by a passenger, a request to charge that the proximate cause of the collision and injury was the throwing off of the trolley is properly refused.<sup>1</sup> If the claim be that plaintiff was injured while boarding the car by reason of its sudden starting, an instruction that to warrant a finding that the injury was caused by the want of ordinary care on the part of the conductor, the jury must find that the accident might reasonably have been expected as a result of his conduct by such conductor in the exercise of ordinary care as "a man of intelligence having a knowledge that may be reasonably expected and ought to have been had" in doing such work, is erroneous, since it permitted the jury to use as a standard their idea of what a conductor ought to be, instead of what they usually are.<sup>2</sup> If the claim be that the

98. Root v. Des Moines City R. Co. (Iowa), 83 N. W. 904.

99. Holmes v. Ashtabula R. T. Co., 10 O. C. D. 638.

1. Blanchette v. Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481.

2. Dehsoy v. Milwaukee El. Ry. & L. Co. (Wis.), 85 N. W. 973.

injuries were sustained in being thrown from the car shortly after it had crossed the tracks of another company in violation of a city ordinance requiring cars to stop before crossing tracks of other companies, the court may properly instruct that if the car was not stopped at the crossing, and the failure to stop contributed to its derailment, such failure could be considered in determining whether the company was liable.<sup>3</sup> If the court explain to the jury what constitutes an unavoidable accident and instruct them that if the injury to the plaintiff were the result of such an accident the defendant is not liable, the instruction is not open to the objection that "it did not permit the jury to consider the defense that said injury was caused by an unavoidable accident."<sup>4</sup> Where the plaintiff limits himself to a right to recover for the negligence of defendant (where it appeared that the car got away from the gripman on an incline) and the defendant contends that the injury was caused by unavoidable casualty, it is proper to charge that though plaintiff was hurt without his fault, yet defendant was not liable unless the jury find that the car went down the incline by reason of defendant's negligence; and if by reason of any unavoidable casualty it got beyond the control of defendant's gripman, then there was no negligence.<sup>5</sup> Where the injuries occasioned by being dragged along are alleged in the complaint only as an incident to the primary act of negligence, a charge that even if the car started before plaintiff attempted to alight, yet, if it were possible for defendant's servants to have stopped the car in a shorter space, and by reason of their neglect in that regard she was injured, then

3. Macon Consol. St. R. Co. v. Barnes (Ga.), 38 S. E. 756. 5. Fearey v. Met. St. Ry. Co. (Mo.), 62 S. W. 452.

4. *Id.*

it was negligence, is error.<sup>6</sup> It is proper in such an action for the court in its charge to the jury to comment on the failure of the defendant to produce the driver and conductor as witnesses.<sup>7</sup>

**§ 44. Damages in such cases.**— It is not intended to call attention in this section to matters of law that have been for a long time well settled, nor to announce elementary rules on the measure of damages, but only to cite some recent rulings where the damages awarded have been held to be excessive or inadequate, or where something was involved in the ruling not according to the usual course. A verdict for defendant will not be reversed because mere nominal damages should have been awarded to the plaintiff.<sup>8</sup> A verdict of \$1,500 in favor of a widow sixty-three years of age, a self-supporting washerwoman in vigorous health,

6. Kelley v. Third Ave. R. Co., 25 App. Div. (N. Y.) 603, 50 N. Y. Supp. (84 St. Rep.) 426.

7. Ripley v. Second Ave. R. Co., 8 Misc. Rep. (N. Y.) 449, 59 St. Rep. (N. Y.) 37, 28 N. Y. Supp. 683. The jury in a negligence case should not be instructed that a witness, as to an important fact, had either perjured himself or had told the truth, because the jury would have no opportunity to find that he might have been mistaken. Smith v. Lehigh Val. R. Co., 170 N. Y. 390. When specific questions of fact have been submitted to the jury to be passed upon by them, with instructions to render a general verdict also, the judge presiding at the trial has no power, after the jury have answered the specific questions of fact and rendered a general verdict, to dismiss

the complaint upon the merits, nor to set aside the answers, save one, to the specific questions, nor to set aside the general verdict. In such case he should either nonsuit the plaintiff or direct the jury to render a general verdict. Hoey v. Met. St. R. Co., 70 App. Div. (N. Y.) 61. And see Fay v. Brooklyn H. R. Co., 69 App. Div. (N. Y.) 563.

8. Pronk v. Brooklyn Heights R. Co., 68 App. Div. (N. Y.) 390. In the case cited it was claimed that plaintiff had been thrown from her seat in defendant's car when the car ran off the track upon a blind switch; and practically the sole issue submitted to the jury was whether the plaintiff suffered any injury from the accident; and the jury found for the defendant.

earning, for the support of herself and her unmarried, sick, and dependent daughter, from eight to eleven dollars a week, it appearing that from the accident she suffered constant pain and had become permanently lame, bent, and decrepit and an apparent charge for life upon her unmarried daughter, is not excessive.<sup>9</sup> A verdict of \$7,000 for a man twenty-eight years old who, prior to the accident, earned \$20 a month besides his board and washing, is not excessive, where it appeared that after being idle about a year after the accident he went to work again, earning about \$5 per month besides his board and washing; and a verdict of \$1,000, rendered upon a former trial of the case, was properly set aside as inadequate. The injuries necessitated the amputation of one of his legs below the knee.<sup>10</sup> Where the action is for an assault by a conductor of the defendant, and it appears that the plaintiff was badly beaten and disabled, a verdict of \$2,500 is not excessive.<sup>11</sup> A recovery may always be had for loss which the plaintiff may have suffered because of inability to attend to his business after the accident.<sup>12</sup> Where plaintiff was badly injured in falling eighteen feet from a platform on a pole supporting electric wires, the fall being caused by a shock of electricity, a verdict of \$1,500 was held not excessive.<sup>13</sup> A verdict of \$300 is not excessive for one whose knee was badly injured and who was under the con-

9. *Sidmond v. Brooklyn H. R. Co.*, 69 App. Div. (N. Y.) 471.

10. *Eberhardt v. Met. St. Ry. Co.*, 69 App. Div. (N. Y.) 560.

11. *Birmingham Ry. & El. Co. v. Baird* (Ala.), 30 So. 456.

12. *Storrs v. Los Angeles Tract. Co.* (Cal.), 66 Pac. 72. In the case cited, it appeared the plaintiff was seventy-five years old, and up to the time of the injury had been

active and in good health and engaged in his own business which was extensive, and that he held positions of trust in several financial institutions. Because of the injury he became afflicted with heart disease, and his capacity to do business was impaired, the verdict was \$2,000. Held not excessive.

13. *Tedford v. Los Angeles El. Co.* (Cal.), 66 Pac. 76.

stant care of a physician for two months and had not fully recovered nearly a year later.<sup>14</sup> Where the young man injured was twenty-three years of age, was studying law, and engaged in the business of publishing a newspaper and subsequent to the injury was unable to do any work, either physical or mental, or to effect a cure, and expended \$1,465.45 for necessary medical attendance, \$3,000 was not excessive.<sup>15</sup> A verdict for \$5,000 was excessive to plaintiff who suffered an incomplete fracture of the tibia of his left leg and in twelve days was discharged from the hospital at his own request, went home, and there remained in bed for about two weeks, from that time for about two months walked on crutches, able to do some work, and in the following spring was employed at plowing and walked four miles to and from his work and did the work of a regular hand.<sup>16</sup> A woman injured, two months in the hospital, and walking on crutches for four years thereafter, with her recovery a matter of doubt, is entitled to \$2,500, and such verdict is not excessive.<sup>17</sup> . Where the injury occasioned a fracture of the thigh bone of a young man, rupture of the ligaments of the knee joints, a fracture of the lower bone supporting the frame of the eye, a verdict for \$6,000 was not excessive.<sup>18</sup> A verdict of \$2,000 is not excessive for a painful injury to plaintiff's foot causing him to lose much time and rendering him a slight cripple for life.<sup>19</sup> A verdict of \$2,800 is excessive for a woman sustaining a simple fracture of the small bone of the leg near the ankle joint

14. *Sheyer v. Lowell* (Cal.), 66 Pac. 307.

15. *City of Salem v. Webster*, 95 Ill. App. 120; affd., 61 N. E. 323.

16. *Chicago, etc., Ry. Co. v. Stickman*, 95 Ill. App. 4.

17. *Chicago City Ry. Co. v. Cooney*, 95 Ill. App. 471.

18. *City of Chicago v. Baker*, 95 Ill. App. 413.

19. *Bowling Green S. Co. v. Capshaw*, 64 S. W. 507. And see

and a strain of the ligaments of the leg, where she recovered except for a slight limp which would not affect her earning capacity, and she suffered slightly in her ankle in rainy weather and when standing on her foot all day; there was no disfigurement of the ankle except a slight thickening of the ligaments and a slight inflammation.<sup>20</sup> A verdict of \$7,250 for loss of services of plaintiff's wife, forty-eight years old, where she was practically incapacitated for discharging nearly all her wifely duties, was not excessive.<sup>21</sup> A verdict of \$12,750 to a woman thirty-one years old, living with her husband, a policeman, and doing all the housework, is not excessive, she having suffered a sprained back, a very bad sprain of the right ankle, a laceration of its ligaments, three fractures and a laceration of the left ankle, and much attendant pain and suffering, a weakness in the right foot, a deformity in the left, and it was impossible for her to get her heel on the ground, nor would the foot support the normal weight of the body. There was also permanent inflammation; she required support to stand — a crutch any way — suffered continuous pain, and her condition was likely to be permanent.<sup>22</sup> A verdict for \$1,054 not excessive for a farmer struck by a crossbar on defendant's car, who thereby became senseless and ill, suffering great pain and dizziness, attended with nausea and vomiting, was unable to work or to go out into his fields to superintend his men without a sunshade, and the pain continued throughout the following

Louisville, H. & St. L. R. Co. v. Bowlds (Ky.), 64 S. W. 957.

20. Collins v. City of Janesville (Wis.), 87 N. W. 241.

21. Zingreve v. Union Ry. Co.,

56 App. Div. (N. Y.) 555, 67 N. Y. Supp. (101 St. Rep.) 554.

22. Leonard v. Brooklyn H. R. Co., 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. (101 St. Rep.) 985.

summer.<sup>23</sup> Four hundred dollars not excessive for a man seventy years old thrown down by the sudden starting of a street car and sustaining painful injuries; he suffered pain in his side at the time of the trial, three months after the accident. There was no evidence of his earning capacity, except that he had been able to support himself.<sup>24</sup> One thousand four hundred dollars for injury to a woman not excessive where she was rendered unconscious by the accident and remained so for three days. Her knee and elbow were bruised and bleeding, the left side of her head swollen, ear bleeding; in bed three weeks and at home for seven weeks, and she suffered pain in her head and hip at the time of the trial, pains in her ear, her ear buzzed; she had headaches, and her weight was reduced twenty pounds.<sup>25</sup> Where the injuries to a man fifty years of age were permanent and grew progressively worse and required the expenditure of \$600 for physician's services, a verdict for \$3,500 was not excessive.<sup>26</sup> Seven thousand dollars for a healthy young man receiving injuries necessitating the amputation of a leg above the knee is not excessive.<sup>27</sup> Twenty thousand dollars for injuries to a child three years of age which rendered him a physical wreck, permanently impairing his faculties, with little hope of recovery, not excessive.<sup>28</sup> Three thousand dollars to a man capable of earning \$12 a

23. Smith v. Nassau El. R. Co., 57 App. Div. (N. Y.) 152, 67 N. Y. Supp. (101 St. Rep.) 1044.

24. French v. Brooklyn H. R. Co., 57 App. Div. (N. Y.) 204, 68 N. Y. Supp. (102 St. Rep.) 287.

25. Radjaviller v. Third Ave. R. Co., 58 App. Div. (N. Y.) 11, 68 N. Y. Supp. (102 St. Rep.) 617.

26. Mowbray v. Brooklyn H. R. Co., 59 App. Div. (N. Y.) 239, 69 N. Y. Supp. (103 St. Rep.) 435.

27. Cosselmon v. Dunfee, 59 App. Div. (N. Y.) 467, 69 N. Y. Supp. (103 St. Rep.) 271.

28. Lacs v. Everhard's Breweries, 61 App. Div. (N. Y.) 431, 70 N. Y. Supp. (104 St. Rep.) 672.

week, incapacitated for work by the injury for fourteen months, one of his legs made an inch shorter than before, who experienced considerable pain in it, and was disabled from doing all kinds of work that he did before, is not excessive.<sup>29</sup> Three thousand four hundred and one dollars and twenty cents for a small child sustaining injuries which necessitated the amputation of one limb and two toes from the other, not excessive.<sup>30</sup> Eleven thousand five hundred dollars not excessive for the loss of a leg above the knee to a man fifty-four years of age, a compound fracture of the right arm, bruising of the head, ribs, and face, and cutting of the left hand, who had earned about \$10 a week before his injury and could earn only about \$5 afterward, had been employed for ten years by a telegraph company, and at the time of the accident was a roundsman in charge of six or eight men.<sup>31</sup> One thousand nine hundred dollars not excessive for a woman where the injuries occasioned certain tumors, and it was necessary to permit a surgical operation, and a physician testified that there was a defective condition which would be permanent at the place where the tumors were removed.<sup>32</sup> Three thousand dollars not excessive to an employee employed to fire and wipe the engines of a street railway company in its power-house, who was injured by a fall through a defective floor, rupturing the ligaments of his back and breaking one of his ribs, injuring his head so that he became entirely deaf in one ear.<sup>33</sup> Six thousand

29. *Weingarten v. Met. St. Ry. Co.*, 62 App. Div. (N. Y.) 364, 70 N. Y. Supp. (104 St. Rep.) 1113.

(N. Y.) 361, 73 N. Y. Supp. (107 St. Rep.) 91.

30. *Fullerton v. Met. St. R. Co.*, 63 App. Div. (N. Y.) 1, 71 N. Y. Supp. (105 St. Rep.) 326.

32. *Jarvis v. Met. St. R. Co.*, 65 App. Div. (N. Y.) 490, 72 N. Y. Supp. (106 St. Rep.) 829.

31. *Hill v. Starin*, 65 App. Div.

33. *Chicago Gen. Ry. v. McNamara*, 94 Ill. App. 188.

dollars not excessive to a workman who loses his foot and a part of his leg.<sup>34</sup> Seven thousand five hundred dollars not excessive to a healthy, strong, active man, capable of hard manual labor, for thirteen years employed by a single firm as a teamster, forty years of age, earning capacity \$12 a week; after the injury he had pains in his stomach, breast, and back, and in his legs, so that he could use them but very little; other complications also.<sup>35</sup> Fifteen thousand dollars for the loss of both legs, where artificial limbs cannot be used, not excessive.<sup>36</sup> Ten thousand dollars excessive and reduced to \$3,500, where the employee's leg was broken in two places above the ankle, the bones crushed and ankle sprained, a fracture of the right leg below the knee, so that four months after the accident he was barely able to get around on crutches; left leg permanently weakened, not probable that he would be able to work within ten months from the date of the accident; thirty years of age and earning \$2.25 a day.<sup>37</sup> One thousand dollars for breaking leg not unreasonable.<sup>38</sup> Twelve thousand five hundred dollars not excessive for a healthy man fifty-two years of age, earning from \$1.75 to \$3 per day in addition to what he made from his farm, who was permanently injured, totally incapacitated for work, and suffered a great deal of pain.<sup>39</sup> Eighteen thousand dol-

34. Ill. Central R. Co. v. Aland, 94 Ill. App. 428.

35. Chicago City Ry. Co. v. Anderson, 93 Ill. App. 419.

36. Ill. Central R. Co. v. Stewart (Ky.), 63 S. W. 596.

37. Moore v. W. R. Pickering Lumbering Co., 105 La. Ann. 504, 29 So. 990.

38. Wiczynski v. American Sugar Refining Co. (N. J. Sup.), 49 Atl. 530.

39. International & G. N. R. Co. v. Woodward (Tex. Civ. App.), 63 S. W. 1051. For other recent cases where motions have been made to set aside verdicts as excessive, see Macon Consol. St. R. Co. v. Barnes (Ga.), 38 S. E. 756; Union Bridge v. Teehan, 92 Ill. App. 259; Yazoo & M. V. R. Co. v. Martin (Miss.), 29 So. 829; Perrette v. City of Kansas City (Mo.), 62 S. W. 448; Hires v. Atl.

lars not excessive for a young woman whose injuries were permanent and consisted of a broken arm so lacerated that it could not be set straight; made incapable of movement, and a fracture of the skull from which a part of the bone was removed, which often became inflamed, causing nervousness, headaches, loss of memory, and weak eyes.<sup>40</sup> Where the complaint in an action to recover damages for injuries received in operating a street car alleges that the plaintiff "was prevented from attending to her duties as a manufactory employee," she is entitled thereunder to testify upon the trial how much she earned as wages, as a basis for the recovery of her loss of wages.<sup>41</sup> Permanent injuries should be pleaded; but an error in allowing proof of such special damages is cured by instruction to the jury at the close of the trial in effect to disregard such evidence and not to award damages for future consequences.<sup>42</sup> A verdict of \$250 as compensation for indignity, humility, and injury to feelings received from a technical assault committed in ejecting the person from the street car, is excessive.<sup>43</sup> In determining the value of plaintiff's services, the jury should take into

City R. Co. (N. J. Sup.), 48 Atl. 1002; Mich. Cent. R. Co. v. Waterworth, 21 Ohio C. C. 495, 11 O. C. D. 621; Blackswell v. O'Gorman Co. (R. I.), 49 Atl. 28; Sherman S. & S. Ry. Co. v. Eares (Tex. Civ. App.), 61 S. W. 550; Wren v. Golden T. Min. Co. (Wash.), 64 Pac. 174; North Chicago St. R. Co. v. Smadraff, 89 Ill. App. 411, 59 N. E. 527; Chesapeake & O. Ry. Co. v. Davis (Ky.), 58 S. W. 698, 60 id. 14, 22 Ky. L. Rep. 748, id. 1156; Walton v. Chattanooga R. T. Co., 105

Tenn. 415, 58 S. W. 737; Rush v. Spokane Falls & N. Ry. Co., 23 Wash. 501, 63 Pac. 500.

40. Stewart v. Long Isl. R. Co., 54 App. Div. (N. Y.) 623, 66 N. Y. Supp. 436; affd., 166 N. Y. 604, 59 N. E. 1130.

41. Russell v. Met. St. Ry. Co., 35 Misc. Rep. (N. Y.) 293.

42. Crow v. Met. St. Ry. Co., 26 N. Y. L. J. 2319 (No. 149 of March 29, 1902).

43. Conlon v. Met. St. Ry. Co., 34 Misc. Rep. (N. Y.) 394, 69 N. Y. Supp. 653.

consideration the question whether or not plaintiff would have procured employment had he been at his place of destination during the time he was delayed, where the action is brought for breach of contract in transportation.<sup>44</sup>

44. *Ransberry v. North American Transp. & T. Co.*, 22 Wash. 476, 61 Pac. 154. And see *International & G. N. R. Co. v. Sampson* (Tex. Civ. App.), 64 S. W. 692. If a new trial be granted because an excessive verdict in favor

of the plaintiff is rendered, the defendant should not be required to pay the costs and disbursements of the original trial. *Helgers v. S. I. M. R. Co.*, 69 App. Div. (N. Y.) 570.

## CHAPTER VII.

### Taxes; Special Assessments· License Fees.

- SECTION 1. Legislative power to tax.  
2. Uniformity required by Constitution.  
3. Exemption from taxation.  
4. Commutation for taxes.  
5. Taxation of tangible property.  
6. Taxation of same railroad property in several municipalities.  
7. Taxation of capital stock.  
8. Taxation of franchise.  
9. Taxation of earnings.  
10. License fees.  
11. Effect of consolidation.  
12. Special assessments.

§ 1. **Legislative power to tax.**—The power of taxation is vested in the legislature and is practically absolute, except as restrained by constitutional limitations. All its incidents are within the control of the legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case the fixing of a district of assessment; the method of collection, and whether the tax shall be a charge upon both persons and property, or only on the lands, are matters within the discretion of the legislature, and in respect to which its determination is final.<sup>1</sup> It has power to form taxing districts for special purposes, without regard to the boundaries of political or municipal subdivisions of the State.<sup>2</sup> It determines all questions of discretion or policy in hearing and apportioning taxes; it makes all the necessary rules and regulations and

1. *Genet v. City of Brooklyn*, 272; *State v. South-Penn Oil Co.*, 99 N. Y. 296, 306; *State v. County of Kings*, 125 id. 312, 320, 34 St. Rep. (N. Y.) 782, 26 N. E. 42 W. Va. 80, 24 S. E. 688.

2. *Gilson v. Rush Co.*, 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835.

decides upon the agencies by means of which the taxes shall be collected. When, as may sometimes happen, the legislature transcends its functions and enacts, in the case of a tax law, a law whereby the property of the citizen is confiscated or taken for private purposes, the judiciary has the right and duty to interpose.<sup>3</sup> The legislature cannot be held to have intended to surrender the taxing power unless its intention to do so has been declared in clear and unmistakable words. When there is no express contract against taxation in the charter of a corporation, it takes its charter subject to the same right of taxation in the State that applies to all other privileges or property. The franchise to build and run a street surface railroad is as much subject to taxation as any other property.<sup>4</sup> It is a franchise obtained through power given to the city by the State, but the State reserves the power to regulate such franchise and impose conditions upon it; it reserves the power to determine the question of the exemption of the company from taxation and to prescribe what burdens should be imposed upon it for the public good in the enjoyment of its franchise. Manifestly, such power of the State would exist if the right to occupy the streets with tracks were granted to the company directly by an act of the legislature of the State; and the case is not changed by the fact that the franchise is granted by a municipality. It is not in the power of the municipality by any contract with the company constructing the railroad to deprive the legislature of the State of the power to tax the company.<sup>5</sup> The Consti-

3. *Thomas v. Gay*, 169 U. S. 264, 283, 42 L. Ed. 740, 747, 18 Sup. Ct. Rep. 340; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 43 S. W. 115.

4. *New Orleans City & L. R. Co. v. New Orleans*, 143 U. S.

192, 36 L. Ed. 121, 12 Sup. Ct. Rep. 406.

5. *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 34 L. Ed. 898, 9 Ry. & Corp. L. J. 251, 11 Sup. Ct. Rep. 226, 46 Am. & Eng. R. Cas. 169.

tution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the States. That is left to the State Constitutions and State laws.<sup>6</sup> The legislature may confer power upon municipal corporations to tax street surface railroads.<sup>7</sup> But it is not to be presumed that the taxing power of the State is relinquished or delegated unless the intention to do so be declared in clear and unambiguous terms.<sup>8</sup> But the power to tax for municipal purposes must be given to the municipality itself, and cannot be delegated to other agencies, even upon the theory that as the people elect the mayor and council, their appointees are in fact selected by the people, or the people thereby assent to such delegation of the taxing power.<sup>9</sup> The power of the State to tax is limited to such property as is within its jurisdiction.<sup>10</sup> Lines of railroad cannot be taxed for years that passed away before they were built; nor can they be subjected to sale for the payment of taxes due upon other railroads, by reason of the accidental circumstance that they have become the property of the same corporation that owns the road liable to taxation.<sup>11</sup> A municipality has no inherent power to tax a street surface railroad corporation operating within

6. New Orleans City & L. R. Co. v. New Orleans, *supra*.

7. Chicago, St. L. & N. O. R. Co. v. Kentwood, 49 La. Ann. 931, 22 So. 192; State, Howe v. Des Moines, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285; People v. Chicago, 51 Ill. 17, 2 Am. Rep. 278.

8. Keokuk & W. R. Co. v. Mo. R. Co., 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. Rep. 592; Harward v. St. Clair, etc., Co., 51 Ill. App. 130; Wyandotte Co. Comrs. v. Abbott, 52 Kan. 148, 34 Pac. 416; McCulloch v. Maryland, 17 U. S.

(4 Wheat.) 428, 4 L. Ed. 606; People, Park Comrs. v. Detroit, 28 Mich. 227, 15 Am. Rep. 202.

9. State, Howe v. Des Moines, *supra*; Charleston v. Postal Tel. Cable Co. (S. C. C. P.), 9 Ry. & Corp. L. J. 129.

10. N. Y., L. E. & W. R. Co. v. Penn., 153 U. S. 628, 38 L. Ed. 846, 14 Sup. Ct. Rep. 952.

11. Staten v. Savannah, F. & W. Ry. Co., 111 Ga. 803, 36 S. E. 938; Bloxham v. Florida, C. & P. R. Co., 35 Fla. 625, 17 So. 902; Wagner v. Evans, 170 U. S. 588, 42 L. Ed. 1154, 18 Sup. Ct. Rep. 730.

its limits; neither can it make a contract with such corporation that nonuser of street railway tracks for any specified time shall not operate as a forfeiture of the franchise, since this would involve authority to grant the right to use the streets for private purposes.<sup>12</sup> Since a municipality has no inherent power to tax, it cannot add any burden to a tax authorized by legislature; so the costs provided for in a distress proceeding for the collection of taxes under the New York Code, § 854, cannot include any fees, where the taxes were paid on service of the warrant without distress and sale.<sup>13</sup>

**§ 2. Uniformity required by Constitution.**—The fourteenth amendment to the Federal Constitution was not intended, in respect to taxation, to compel the State to adopt an iron rule of equality to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. And due process of law, within the meaning of the amendment, is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.<sup>14</sup> The constitutional provision for uniform and equal taxation is complied with, in respect to railroad property, when the same basis of assessment is fixed for all such property, and the same rate fixed for all property in any district subject to taxation.<sup>15</sup> A statutory

12. *State, Kansas City v. East Fifth St. Ry. Co.*, 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218.

13. *Manhattan v. Merges*, 38 App. Div. (N. Y.) 120; affd., 167 N. Y. 539, 60 N. E. 1115.

14. *Giozza v. Tiernan*, 148 U. S.

657, 37 L. Ed. 599, 13 Sup. Ct. Rep. 721; *Leeper v. Texas*, 139 U. S. 462, 35 L. Ed. 225.

15. *Cleveland, C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729. In the case cited it was held that a

provision that different kinds of property shall be assessed by different assessors, as, for example, certain kinds by a State board, does not conflict with the constitutional requirement of a uniform and equal rate of taxation, where all property is required to be assessed at its actual cash value.<sup>16</sup> And the constitutional requirement that the legislature shall provide for a uniform and equal rate of taxation necessitates a uniform rate only in each separate taxing district in the State, and is not violated by a statute authorizing county boards of designated counties to levy and collect a tax in excess of that authorized by a general law.<sup>17</sup> A statute making the capital stock of corporations a distinct class of investments for the purpose of taxation is not unconstitutional as providing for taxation not uniform. Substantial and not absolute uniformity is all that is required.<sup>18</sup> The property of a railroad company so differs from every other species of property that a discrimination in the methods and instrumentalities by which the value of such property is ascertained for purposes of taxation, as, for example, by assessing it annually while lands are required to be assessed every five years, does not indicate a design to oppress railroad companies and does not constitute want of uniformity and equality in taxation.<sup>19</sup> The business or the franchises

statute providing that the rolling stock of a railroad company shall be leased and taxed in the several counties, etc., in the proportion that the main track in such county bears to the total length of the main track, does not impose double taxation on the ground that values of rolling stock taxable in other States are imported into the State for the purpose of taxation.

16. Cleveland, C. C. & St. L. R. Co. v. Backus, *supra*; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437.

17. Midland Elev. Co. v. Stewart, 50 Kan. 378, 32 Pac. 33; State, Milwaukee St. R. Co. v. Anderson, 90 Wis. 550, 63 N. W. 746.

18. Commonwealth v. National Oil Co., 157 Pa. St. 563, 27 Atl. 374, 33 W. N. C. 137; Commonwealth v. Mill Creek Coal Co., 157 Pa. St. 524, 27 Atl. 375.

19. Chamberlain v. Walter (C. C. D. S. C.), 60 Fed. 788. And see Columbia & P. S. R. Co. v. Chilberg, 6 Wash. 612, 34 Pac. 163; State, Poe v. Jones, 51 Ohio St.

of a corporation may be taxed, and a statute authorizing such tax is not objectionable to a constitutional provision requiring uniform laws taxing all kinds of property.<sup>20</sup> A constitutional and legal inequality in taxation does not refer to individual hardship, nor to those differences in value which grow out of mere differences of opinion, nor to inequality which arises by reason of an essential difference in the kind and use of property with a proportionate difficulty of getting at the real value. It refers only to substantial differences relating to large classes of property and to differences in the system or methods by which such properties are assessed for taxation.<sup>21</sup> The rule of uniformity in taxation required by the United States Constitution is complied with if the tax operate equally upon the specified subject-matter wherever and whenever found throughout the United States.<sup>22</sup> This rule of uniformity is not violated, nor is any unlawful discrimination made between individual taxpayers and corporations, companies, and associations by the fact that the intangible property of such corporations, companies, and associations is taxed under the State statute by a somewhat different mode from that of individual taxpayers.<sup>23</sup>

492, 48 Am. & Eng. Corp. Cas. 239, 32 Ohio L. J. 54, 37 N. E. 945; Atlanta & F. R. Co. v. Wright, 87 Ga. 487, 13 S. E. 578; Columbus S. R. Co. v. Wright, 89 Ga. 574, 54 Am. & Eng. R. Cas. 255, 15 S. E. 293.

20. W. U. T. Co. v. Poe (C. C. S. D. Ohio), 61 Fed. 449; Adams Exp. Co. v. Poe, *id.* 470. And see Banta v. Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611.

21. Railroad & Tel. Cos. v.

Board of Equalizers (C. C. M. D. Tenn.), 85 Fed. 302.

22. Nicol v. Ames (C. C. N. D. Ill.), 89 Fed. 144, 31 Chic. Leg. N. 43; Taylor v. Louisville & N. R. Co. (C. C. App. 6th C.), 88 Fed. 350, 60 U. S. App. 166, 31 C. C. A. 537. And see W. U. T. Co. v. Norman (C. C. D. Ky.), 77 Fed. 13.

23. Weir v. Norman, 166 U. S. 171, 41 L. Ed. 960, 17 Sup. Ct. Rep. 527.

§ 3. **Exemption from taxation.**— Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all. Common burdens should be sustained by common contributions, regulated by fixed rules, and be apportioned, as far as possible, in the ratio of justice and equity.<sup>24</sup> The settled rule established by the highest courts requires that exemption from taxation, so essential to the existence of government, must be expressed in the clearest and most unambiguous language, and not be left to implication or inference.<sup>25</sup> The constitutional power to grant exemption, wholly or partially, from taxation and for fixed or indefinite periods, includes the power to exempt, upon conditions or contingencies which are to happen in the future. So there may be in the charter of the railroad company a provision that “no tax shall ever be laid on said road or its fixtures which shall reduce the dividends below eight per cent.,” and such provision will amount to an exemption from taxation to the extent and for the purposes stated, and is not invalid for vagueness or uncertainty because of the contingency involved.<sup>26</sup> There may be an exemption from *ad valorem* tax given by a railroad charter; that is, from taxation

24. Union Pass. Ry. Co. v. Phila., 101 U. S. (11 Otto.) 528, 538, 25 L. Ed. 912, citing Cranford v. Burrell, 53 Pa. St. 219; Cooley Tax. 152; Sutton v. Louisville, 5 Dana, 28, 31.

25. People v. Cook, 148 U. S. 397, 409, 37 L. Ed. 498, 502, 13 Sup. Ct. Rep. 645, citing Vicksburg S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. Ed. 770; Chicago, B. & K. C. R. Co. v. Missouri, 120 U. S. 569, 30 L. Ed. 732; Wilmington & W. R. Co. v. Alstrook, 146 U. S. 279, 294, 36 L. Ed. 972, 978; People

v. Davenport, 91 N. Y. 574, 586. And see Sindall v. Mayor, etc., of Baltimore (Md.), 49 Atl. 645; Parker v. Quinn (Utah), 64 Pac. 961; New Orleans v. Robira, 42 La. Ann. 1098, 8 So. 402, 11 L. R. A. 141; State, Orange & Newark H. R. Co. v. Douglass, 34 N. J. L. 82; Butler's Appeal, 73 Pa. St. 448; Wis. Central R. Co. v. Taylor Co., 52 Wis. 37; Indianapolis v. Sturdevant, 24 Ind. 391.

26. Mobile & O. R. Co. v. Tenn., 153 U. S. 486, 38 L. Ed. 793, 14 Sup. Ct. Rep. 968.

of the capital stock, dividends, roads and fixtures, depots, workshops, and vehicles of a railroad company. But such exemption is not impaired or infringed by a privilege tax on the occupation of the railroad companies so exempt.<sup>27</sup> Municipal corporations, themselves creatures of statute, and possessing only powers specifically conferred by the legislature, have no inherent authority to grant exemptions. Of course the power to exempt property within the municipality from taxation may be expressly conferred upon the municipality by the legislature.<sup>28</sup> If there be an exemption from taxation of the main line of a railroad company, the transfer to it of the road of another company does not make the road so transferred such an extension of the main line as to bring it within the exemption from taxation which by its charter is confined to the main line alone.<sup>29</sup> A transfer of the property of a corporation to which an exemption from taxation is granted in the charter of the company to another company will defeat the exemption.<sup>30</sup> Lands held by a railroad for

27. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 43 S. W. 115.

28. *People ex rel. v. Campbell*, 93 N. Y. 196; *Chicago v. Baer*, 41 Ill. 306; *Grant v. Davenport*, 36 Iowa, 396; *State v. Hannibal & St. J. R. Co.*, 75 Mo. 208.

29. *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 278, 36 L. Ed. 972, 13 Sup. Ct. Rep. 72, 53 Am. & Eng. R. Cas. 687. In the case cited it was held that a grant to branch roads of a railroad company of all the powers, rights, and privileges conferred on the company in respect to its main road in the construction, use, and preservation of said branch roads, carries with it only the powers, rights, and privileges of the main road in the con-

struction, repair, and operation of the branches, and does not include exemption from taxation, which was one of the privileges of the main road. And see *S. C.*, 110 N. C. 137, 14 S. E. 652.

30. So held, upon a lease of all the property of the company having the exemption to another company in consideration of the completion of the road within a certain time without provision for reversion. *Commonwealth v. Nashville, C. & St. L. R. Co.*, 14 Ky. L. Rep. 442, 54 Am. & Eng. R. Cas. 294, 20 S. W. 383. And see *Baltimore, C. & A. R. Co. v. Ocean City*, 89 Md. 89, 14 Am. & Eng. R. Cas. (N. S.) 195, 42 Atl. 922; *Chesapeake & O. R. Co. v. Miller*, 114

terminal purposes, proper and necessary therefor, but not actually used, and intended only to be used thereafter at such indefinite future time as the financial condition of the company might permit the development of such lands for such purposes, are not exempt from taxation under a statute exempting from taxation lands of a railroad company used for railroad purposes.<sup>31</sup> Where the State court of last resort has passed upon the question of statutory exemption, its construction of the statute will be adopted by the Supreme Court of the United States even in a case where that court may exercise an independent judgment, if there be any reasonable doubt on the question.<sup>32</sup> The right of a railroad to cross a highway is not exempt from the taxation of franchises authorized by the New York statutes and also authorizing the

U. S. 176, 29 L. Ed. 122. In Colorado, it has been held that the constitutional inhibition against the exemption from taxation of all property, except certain enumerated kinds not including railroad property, is not violated by a statute providing that the assessed value for the purpose of taxation of the property of a railroad company within a municipality shall not be dependent upon the actual value of the property physically located therein, but shall bear such relation to the value of its entire property as the length of the main track in the municipality bears to the total length of the line. Ames v. People, Temple, 26 Colo. 83, 56 Pac. 656, citing R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663. And see N. O. & T. P. R. Co. v. Commonwealth, 81 Ky. 492; State, Tillery v. Hannibal & St. J. R. Co., 97 Mo. 348; Chicago & A. R. Co. v. People, Cooley, 129 Ill. 571; Burlington &

M. R. Co. v. Lancaster Co. Com., 15 Nebr. 251; State, Kansas City, etc., R. Co. v. Severance, 55 Mo. 378; Dubuque v. Ill. Cent. R. Co., 39 Iowa, 56.

31. Duluth, S. S. & A. R. Co. v. Douglas Co., 103 Wis. 75, 14 Am. & Eng. R. Cas. (N. S.) 178, 79 N. W. 34, citing Wilmington & R. R. Co. v. Ried, 80 U. S. (13 Wall.) 264, 20 L. Ed. 568; State, Camden, etc., Co. v. Mansfield Comrs., 23 N. J. L. 510, 57 Am. Dec. 409; Vt. C. R. Co. v. Burlington, 28 Vt. 193; State v. Baltimore & O. R. Co., 48 Md. 49; Ramsey Co. v. Chicago, etc., R. Co., 33 Minn. 537; Western & A. R. Co. v. State, 54 Ga. 428; Osborne v. N. Y. & N. H. R. Co., 40 Conn. 441; Boston v. Boston & A. R. Co., 170 Mass. 95; Auditor Gen'l v. Flint, etc., R. Co., 114 Mich. 682, 72 N. W. 992.

32. Yazoo, etc., R. Co. v. Adams, 181 U. S. 580, 45 L. Ed. 1011.

taxation of the tangible property of the corporation situated on a highway, on the theory that the crossing is an easement in the land derived from the owner of the fee rather than a special privilege granted by the public.<sup>33</sup> Where the municipality is authorized to grant exemptions and does exempt a railroad company from all "municipal taxes," such exemption does not include a school tax.<sup>34</sup> The constitutional provision in Missouri that no property shall be exempted from taxation, applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the statute authorizing such consolidation.<sup>35</sup> If the legislature fail to create any specified class of taxable property within which the property necessary to the construction of a street railroad may be included, the horses and stables necessary for the operation of the road are not exempt from taxation, since they are embraced in statutes providing for the taxation of real estate and of horses.<sup>36</sup> Under a statute authorizing the State revenue agent to sue for unpaid taxes after the time required by law for the sale of the property of a railroad company for taxes assessed thereon, if such suit be brought for the purpose of having an adjudication as to the validity of an exemption

33. N. Y., L. & W. R. Co. v. Roll, 32 Misc. Rep. (N. Y.) 321, 66 N. Y. Supp. 748. In the case cited it appeared that the original draft of the law taxing franchises included franchise rights under, above, on, across, or through highways, but the word "across" was omitted from the bill as passed. The other words however had been construed by the courts prior thereto, in the construction of similar statutes, to include the crossing of highways. It was held

that the omission of the word "across" did not show a legislative intent not to tax highway crossings of domestic corporations.

34. Winnipeg v. Canadian Pac. R. Co. (Can.), 12 Man. R. 581.

35. Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. Rep. 592; Same v. Scotland Co. Ct., 152 U. S. 317, 38 L. Ed. 457, 14 Sup. Ct. Rep. 608.

36. Del. Co. v. Chester St. R. Co. (Pa. C. P.), 10 Pa. Co. Ct. 326

claimed by the railroad company under the statute, the sheriff of the county cannot, pending the suit, interfere by selling the property of the company for the taxes.<sup>37</sup>

**§ 4. Commutation for taxes.**—A railroad company may by statute be given immunity from State and county taxation upon the payment in installments of a certain amount in commutation into the State treasury for the use of the State;<sup>38</sup> and the power to commute for taxes may be expressly conferred by statute upon a municipality. If, then, the municipality make a contract with a street railroad corporation to construct and operate a railroad within the municipality, and agree to receive a certain sum annually in full for all municipal taxes, a taxation in addition to the sum so agreed upon cannot be thereafter imposed. So when a city made a contract with a tram-railway company, which contract was accepted and acted upon by the company, providing in unequivocal terms that a percentage of the gross receipts should be received in lieu of all city taxes, except a land tax, it was held that the contract was binding upon the city where the sum agreed upon was more than the regular assessment, and that it could not collect an additional tax on the personal property of the company.<sup>39</sup> Where the city by ordinance granting a street railway franchise required the company to

37. Yazoo & M. V. R. Co. v. West, 78 Miss. 789, 29 So. 475.

38. Neary v. Phila., W. & B. R. Co., 7 Del. (Houst.) 419; 9 Atl. 405.

39. Detroit v. Detroit City R. Co., 76 Mich. 421, 43 N. W. 447, 39 Am. & Eng. R. Cas. 538. In the case cited it was also held that the statute authorizing the commutation might be itself repealed

by the legislature which might provide for specific taxes payable to the State in lieu of all other taxes. And see Daughdrill v. Ala. Life Ins. Trust Co., 31 Ala. 91; Mechanics' Bank v. Debolt, 1 Ohio St. 591, 59 U. S. (18 How.) 380, 15 L. Ed. 458; Dodge v. Woolsey, 59 U. S. 331, 15 L. Ed. 401; City of New Orleans v. St. Charles St. R. Co., 28 La. Ann. 497.

macadamize the roadbed between, and three feet beyond, its rails and keep that portion of the street in good order, to conform to the street grades established by the city, and comply with all the ordinances then in force or that might thereafter be adopted relative to street railways, and in consideration thereof agreed to exempt the company's road from taxation for the period of ten years, it was held that a new charter secured by the city thereafter, providing that street railway companies having tracks through the streets of the city, should be required to macadamize the streets as the commissioners of the streets might direct, controlled the company's liability to pave, and that the ordinance had not the binding force of a contract.<sup>40</sup> The municipality may assess the street railway corporation for State and county taxes, although it had made a contract with it to accept a percentage of its earnings in lieu of all other taxes for city purposes.<sup>41</sup> A corporation chartered "with all rights and privileges" of another company designated, whose charter gave it "all the powers, privileges, and immunities" of a third corporation, does not enjoy the exemption from other taxation of the last corporation under its charter providing that payment of a certain sum shall be in lieu of all other taxes.<sup>42</sup>

**§ 5. Taxation of tangible property.**—The property of a street surface railroad company which may be assessed as real estate within any political division depends largely upon a construction of the statutes of the State in which the property is situate. Thus, in Canada, the rails, poles, and wires of an

40. *City of Atlanta v. Gale City St. R. Co.*, 80 Ga. 276. (Mich.), 85 N. W. 96, 7 Det. Leg. N. 677.

41. *Detroit Citizens' St. Ry. Co. v. Common Council of Detroit* 42. *State, Memphis v. Phoenix F. & M. Ins. Co.*, 91 Tenn. 566, 19 S. W. 1044.

electric railway company laid and erected in public highways are subject to assessment as real estate.<sup>43</sup> In Florida, street railroads are real estate and enjoy the same immunities in the hands of innocent purchasers from back taxes for which no lien exists as other real property.<sup>44</sup> In New Jersey, where railroad properties are not ordinarily assessed for local purposes, it has been held that the tracks and franchises of a steam railroad laid upon certain streets of a city and still used occasionally for railroad purposes, were lawfully assessed by the State Board of Assessors as property used for railroad purposes; but corporeal property, constituting the regular equipment of a line of electric cars operated over such tracks is lawfully assessed by the city as property not in use for railroad purposes.<sup>45</sup> In North Dakota, the word "roadway," as used in the Constitution, requiring that "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in this State shall be assessed by the State Board of Equalization," is held to include not only the ground upon which the main line is constructed, but also the ground necessary for the side tracks, turnouts, connecting track, station-houses, and all other additions reasonably necessary to accomplish the objects of the railroad company's incorporation.<sup>46</sup> In Kentucky, railroad property within the corporate limits is subject to taxation for municipal purposes, although

43. *Re Toronto R. Co.* (Can.), 25 Ont. App. 135.

44. *Bloxham v. Florida C. & P. R. Co.*, 35 Fla. 625, 17 So. 902; *Bloxham v. Consumers' El. L. & St. R. Co.*, 36 Fla. 519, 18 So. 444, 29 L. R. A. 507.

45. *Camden & A. R. Co. v. Atlantic City*, 58 N. J. L. (29 Vroom) 316, 33 Atl. 198.

46. *Chicago, Milwaukee & St. P.*

R. Co. v. Cass Co., 8 N. Dak. 18, 76 N. W. 239, 11 Am. & Eng. R. Cas. (N. S.) 813, 31 Chic. Leg. N. 26, citing *San Francisco & N. P. R. Co. v. State Board of Equalizers*, 60 Cal. 12; *San Francisco v. Central P. R. Co.*, 63 id. 467, 49 Am. Rep. 98; *Chicago & A. R. Co. v. People*, 98 Ill. 350; *Pfaff v. Terre Haute & I. R. Co.*, 108 Ind. 144.

the lands along it are practically farming lands, and it receives no benefit from such tax, since the Constitution imperatively requires the taxation of all property within municipal boundaries, excepting only that expressly exempted.<sup>47</sup> In New Jersey a railroad company which constructs its road, under an oral agreement, upon land of another, may be taxed upon its property, consisting of embankments, tracks, and works constructed for railroad purposes thereon, although a tax is also assessed against the owner of the fee.<sup>48</sup> In California an assessment of the right of way of a railroad company, together with its tracks, substructures, and superstructures for a specified sum per mile is invalid under the constitutional requirement that "land and the improvements thereon" shall be separately assessed.<sup>49</sup> Under a statute providing that all real estate, whether owned by individuals or corporations, shall be liable to taxation at its full value, and that real estate shall include all lands and all buildings or erections thereon or affixed to the same, etc., a street railroad company has such an interest in the soil of the highways over which it passes as is taxable as real estate.<sup>50</sup> Where by statute, in the city of New York, a street railroad company was required to make a tunnel through a street for the purpose of rendering the passage and crossing in the street more safe and convenient, it was held that the tunnels, tracks, substructures, superstructures, stations, viaducts, and ma-

47. Louisville & N. R. Co. v. Barboursville, 20 Ky. L. Rep. 1105, 48 S. W. 985.

48. State, Hoboken, etc., Co. v. State Board of Assessors, 62 N. J. L. 561, 41 Atl. 728.

49. California & N. R. Co. v. Mecartney, 104 Cal. 616, 38 Pac. 448.

50. City of Newark v. State Board of Taxation (N. J. Sup.), 49 Atl. 522. And see Appeal of North Beach, etc., R. Co., 32 Cal. 499; Chicago City Ry. Co. v. City of Chicago, 90 Ill. 573; St. R. Co. v. Morrow, 87 Tenn. 406.

sonry embraced in the improvement were not all taxable as real estate, and that the only taxation to which the railroad could be lawfully subjected would be that to which it would be liable on the assumption that the rails were laid on the Fourth avenue without reference to the tunneling, excavation, and masonry work required by the statute, and constructed in accordance thereto.<sup>51</sup> In Minnesota, it is held that the track of the St. Paul City Railway Company is not real estate within the meaning of the city charter, assessable for the expenses of city paving.<sup>52</sup> In States where all railroad property used for railroad purposes is to be assessed by the State Board of Assessors or Equalizers, and not otherwise, even a machine-shop belonging to a railroad company and used exclusively for necessary repairs incidental to the conduct of its business is not subject to taxation by the local authorities;<sup>53</sup> so of stables, horses, cars, and vehicles used only in and about the business of conveying passengers and produce according to the company's corporate power, and appurtenant and indispensable thereto.<sup>54</sup> An easement in

51. *People ex rel. v. Comrs. of Taxes*, 23 Hun (N. Y.), 687. And see *Met. R. Co. v. Fowler* (C. A.), 1 Q. B. 165.

52. *State ex rel. St. Paul City Ry. Co. v. Dist. Ct.*, 31 Minn. 354. And see *Toronto St. Ry. Co. v. Fleming*, 37 Up. Can. Q. B. 116; *App. Tax Ct. v. Union R. Co.*, 50 Md. 274.

53. *Western N. Y. & P. R. Co. v. Venango Co.*, 183 Pa. 618, 38 Atl. 1088, 41 W. N. C. 325, 28 Pittsb. L. J. (N. S.) 341; *Alleghany Val. R. Co. v. School Dist. (C. P. Pa.)*, 29 Pittsb. L. J. (N. S.) 314; *Lehigh Val. R. Co. v. Bradford Co. Comrs. (Pa. C. P.)*, 24 Pa. Co. Ct. 537. And see on the question

if there be a double assessment of machinery in a power-house, *N. Y. Guaranty & I. Co. v. Tacoma Ry. & M. Co.* (C. C. App. 9th C.), 93 Fed. 51, 35 C. C. A. 192.

54. *Northampton Co. v. Easton, etc., R. Co.*, 148 Pa. St. 282, 23 Atl. 895, 1 Pa. Adv. Rep. 561. In the same State however, it has been held that horses and stables of a street railroad company are not exempt from local taxation although included in the company's capital stock upon which a State tax is paid; but that tracks, superintendent's office, and buildings in which the cars are kept are exempt. *People's St. R. Co. v. Scranton*, 8 Pa. Co. Ct. 633.

land acquired by a railroad company for the purpose of taking earth for the construction of embankments is taxable.<sup>55</sup> Ordinarily the words "railroad track" and "rolling stock," as used in a statute relating to the taxation of railroads, are intended to embrace all that is strictly railroad property.<sup>56</sup> A statute providing that personal property for purposes of taxation shall include the property enumerated in the statute and "all other personal property not herein enumerated" and not exempt, enumerating only intangible property, did not preclude taxation of intangible corporate property, such as franchises, under the general method provided by the statute on the failure of the method prescribed in the latter statute by reason of its invalidity.<sup>57</sup> The valuation by the State board of the franchises of a street railroad company is conclusive as to its value for city assessment in Kentucky.<sup>58</sup> In Texas it is held that the franchises of a railroad, pertinent to the use of its property, are a part of its real estate and not subject to a separate tax, since the franchises required to be returned as personal property have reference to the right to exist and do business as a corporation and to condemn property for which it is required to pay a special tax.<sup>59</sup> As has been stated, in New Jersey, property not possessed and used by a railroad company for railroad purposes is subject to local assessment only, and the use of a trolley line is not a railroad use so that it may be lawfully assessed by the State

55. Chicago & P. R. Co. v. Hildebrand, 136 Ill. 467, 47 Am. & Eng. R. Cas. 145, 27 N. E. 69.

56. Pittsb., etc., R. Co. v. Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 Sup. Ct. Rep. 1114; Schmidt v. Galveston, etc., R. Co. (Tex. Civ. App.), 24 S. W. 547.

57. Detroit Citizens' Ry. Co. v. Common Council (Mich.), 85 N.W.

96, 7 Det. Leg. N. 677. And see Chicago & N. W. R. Co. v. Ellson, 113 Mich. 30, 71 N. W. 324, 4 Det. Leg. N. 178.

58. South Covington & C. St. R. Co. v. Bellville, 29 Ky. L. Rep. 1148, 49 S. W. 23.

59. State v. Austin & N. W. R. Co. (Tex. Civ. App.), 62 S. W. 1050, 60 id. 886.

board of assessors as property in the possession of a railroad company and used by it for railroad purposes.<sup>60</sup> In Ohio taxes and assessments are levied upon the *corpus* of real property and not upon the titles by which it may be held, unless otherwise provided by statute.<sup>61</sup>

#### § 6. Taxation of same railroad property in several municipalities.

— Where the road of a corporation runs through different States or municipalities a tax upon the income or franchise of the road is properly apportioned by taking the whole income or value of the franchise and the length of the road within each municipality as the basis of taxation.<sup>62</sup> If property may be assessed as a unit, there is no obligation to value its separate elements.<sup>63</sup> In Missouri a statute providing for a more uniform assessment and taxation of street railroads in cities, provides that the chief officer of every street railroad company in every city shall furnish to the State auditor a statement setting out the full length of the line and the length in each county, municipality, township, and city

60. *Re Jersey City & B. Ry. Co.* (N. J. Sup.), 49 Atl. 437. See also grain elevators in Iowa, *Hertert v. C., M. & St. Paul Ry. Co.*, 86 N. W. 266.

61. *St. Bernard v. Kemper*, 60 Ohio St. 244, 54 N. E. 267, 45 L. R. A. 662, 42 Ohio L. J. 41.

62. *Minot v. Phila., W. & B. R. Co.*, 85 U. S. (18 Wall.) 206, 21 L. Ed. 888; *Erie R. Co. v. Pennsylvania*, 88 U. S. (21 Wall.) 192, 22 L. Ed. 595. Testimony that the value placed by the board was excessive, together with testimony that portions of the road outside of the State were of largely greater value than any similar length of road

within the State, unaccompanied by evidence that the board reached the valuation by dividing the total value of the company's property, or that it failed to take into consideration the fact of such excessive value of portions outside the State, is insufficient to impeach the determination of the State board. *Pittsb., C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. Ed. 1031, 14 Sup. Ct. Rep. 1114. And see *Railroad Co. v. Marion Co. Comrs.*, 48 Ohio St. 249.

63. *Citizens' St. Ry. Co. v. Common Council of Detroit* (Mich.), 85 N. W. 96, 7 Det. Leg. N. 677.

through or in which it is located; which shall be taxed as property of private persons, and assessed, apportioned, certified, levied, and collected in the same manner as other railroad property. And it is held that a street railroad, a part of whose line is within two cities and a part not within any city, is subject to taxation under this statute.<sup>64</sup> In Iowa a street railroad in a municipal corporation which extends its lines beyond the city limit under statute authority, is not a "railway corporation" within the meaning of another statute providing for the assessment of such corporations in the State by the executive counsel merely because it carries goods and express matter, but is a street railway and subject to taxation by the local assessors.<sup>65</sup>

**§ 7. Taxation of capital stock.**—Under a Pennsylvania statute relating to the taxation of corporations, the question of the actual value in cash of the capital stock of a corporation is a question of fact to be determined by considering the value of its tangible property and assets of every kind, including its

64. State *ex rel.* Gottlieb v. Met. St. Ry. Co., 161 Mo. 188, 61 S. W. 603. And see State *ex rel.* Spratt v. Chicago, etc., Ry. Co., 162 Mo. 391, 63 S. W. 495. In the Gottlieb Case it was held that it was proper to levy a school tax at the rate levied on other property in the school district instead of at the average rate of several school districts throughout the county as prescribed for levying school taxes on other railroads. And see Detroit Citizens' St. Ry. Co. v. Common Council of Detroit (Mich.), 85 N. W. 96, 7 Det. Leg. N. 677, where it was held that a street railway system, consisting of several power plants situated at different

places along the line which extends through or into several taxing districts, and also includes a plant outside the city with which the city board of assessors have nothing to do, may be assessed as a unit, as the legislature may require different portions to be assessed in different places and a fair division of its value may be made by a mutual understanding between the several assessors; citing Express Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep. 305.

65. Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728.

bonds, mortgages, and moneys at interest, and its franchises and privileges; the amount of the incumbrances on its property and franchises may also be considered, but it is not to be specifically deducted from the valuation so ascertained and determined.<sup>66</sup> In New York, under a statute, it has been held that all damages paid by an elevated railroad company to abutting owners is property that may be assessed, but damages paid on account of past interference with their use of easements of light, air, and access do not form a basis upon which any valid assessment can be made, since no right or property of value is acquired by the railroad company in consequence of such payment. It is also held that the commissioners of taxes and assessment are justified in assuming that the capital stock of a corporation remains unimpaired where it appears that it has paid a dividend annually of six per cent. Evidence however might be introduced showing that it had been impaired by the existence of debts, which evidence, if believed, would overcome the presumption that otherwise might exist.<sup>67</sup> Where a domestic railroad corporation acquires property of another similar corporation subject to certain liens, the value of such liens must be deducted from the value of the property so acquired, in determining the property subject to taxation under statutes requiring the taxation of the stock and surplus profits of corporations.<sup>68</sup> Where the property of a domestic corporation, in which is invested all its capital stock, is assessed for taxation, an assessment also on its capital stock is invalid as duplicate tax-

66. Commonwealth v. Shamokin S. L. R. Co. (Pa. C. P.), 3 Dauph. Co. Rep. 168; Com. v. J. & F. Ry. Co., id. 214, 6 Lack. Leg. N. 234.

67. People *ex rel.* Manhattan Ry. Co. v. Barker, 165 N. Y. 305, 59

N. E. 151. And see People v. Feitner, 166 N. Y. 129, 59 N. E. 731.

68. People v. Feitner, 61 App. Div. (N. Y.) 129, 70 N. Y. Supp. 500.

tion.<sup>69</sup> Under the Pennsylvania act requiring corporations to be taxed according to an estimate made by the officers of the corporation as to the actual cash value of its corporate stock which shall not be less than the price or value indicated by the net earnings or by the amount of profits made and declared in dividends or carried in the surplus or sinking funds, the fact that the earnings of a corporation are a sum greater than six per cent. on the actual value of its stock as returned by its officers, does not authorize the assessment of taxes on the assumption that the value of the stock was greater than shown by the estimate.<sup>70</sup> Under the Louisiana statute, requiring the value of the franchise to be measured chiefly by the earning capacity of the corporation, the assessment for taxes should not be based on dividends alone.<sup>71</sup> There is no presumption for purposes of taxation that the indebtedness of a railroad corporation represents property to the amount of such indebtedness in addition to that represented by its capital stock.<sup>72</sup> For the policy of each State as to the taxation of the capital stock of its corporations, the statutes of the particular State will have to be studied. It is held in

69. Lewiston W. & P. Co. v. Asotin Co., 24 Wash. 371, 64 Pac. 544, citing People v. Badlam, 57 Cal. 594; Ridpath v. Spokane Co. (Wash.), 63 Pac. 261.

70. Commonwealth v. Sharon Coal Co. (Pa. C. P.), 3 Dauph. Co. Rep. 243. It is proper to include in the appraisement the value of the franchises and privileges enjoyed and exercised by the corporation and to determine the value of these by the material result of their exercise. Commonwealth v. D., etc., R. Co., 3 Dauph. Co. Rep. 249. And see Commonwealth v. Lake Shore & M. S. R. Co., id. 172;

Commonwealth v. Edgerton Coal Co., id. 236; Commonwealth v. Phila. Co., id. 259.

71. Crescent City R. Co. v. New Orleans, 44 La. Ann. 1057, 11 So. 681; New Orleans & C. R. Co. v. New Orleans, 44 La. Ann. 1053, 11 So. 687.

72. People, Manhattan R. Co. v. Barker, 146 N. Y. 304, 66 St. Rep. (N. Y.) 658, 40 N. E. 996. And see People, Second Avenue R. Co. v. Barker, 141 N. Y. 196, 36 N. E. 184, 56 St. Rep. (N. Y.) 834; Merchants' Ins. Co. v. Newark, 54 N. J. L. (25 Vroom) 138, 23 Atl. 305.

New Mexico that the capital stock of a railroad company is included in a statutory exemption of "all the property of every kind and description."<sup>73</sup>

**§ 8. Taxation of franchise.**— In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property. It matters not in what this intangible property consists — whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property, which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now wherever separate articles of intangible property are joined together, not simply by a unity of ownership, but in the unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax-list and the only property placed thereon the separate pieces of tangible property?<sup>74</sup> The franchise to do is an independent franchise of a corporation, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power

73. Santa Fe R. Co. v. New Mexico & S. P. R. Co., 3 N. M. 116, 2 Pac. 376.

74. Per BREWER, J., in Adams Express Co. v. Ohio State Auditor, 166 U. S. 185, 219, 41 L. Ed. 965, 977, 17 Sup. Ct. Rep. 604.

to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be.<sup>75</sup> The word "franchise," as employed in the Kentucky statute, is not used in a technical sense. The legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and of foreign and domestic corporations possessing no franchises should be valued as an entirety, the value of the tangible property to be deducted and the value of the intangible property thus ascertained is to be taxed under the statutory provisions.<sup>76</sup> The sections of the New York Tax Law, providing for a franchise tax on corporations, and also for the additional franchise tax on elevated railroads or surface railroads not operated by steam will be found in the note hereto.<sup>77</sup> Section 182

75. *Id.*

76. The statute provided, after enumerating companies or corporations, that "every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other tax imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised." Adams Express Co. v. Kentucky, 166 U. S. 171, 180, 41 L. Ed. 960, 963.

77. Sections 182, 185, and 190 of the Tax Law, as contained in 2 Heydecker's Gen. Laws (2d ed.), pp. 1919-1926, are as follows:

**§ 182. Franchise tax on corporations.**—Every corporation, joint-stock company or association incorporated, organized or formed

under, by or pursuant to law in this state, shall pay to the state treasurer annually an annual tax to be computed upon the basis of the amount of its capital stock employed within this state, and upon each dollar of such amount, at the rate of one-quarter of a mill for each one per centum of dividends made and declared upon its capital stock during each year, ending with the thirty-first day of October, if the dividends amount to six or more than six per centum upon the par value of such capital stock. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation. If no dividend is made or declared, the tax shall be at the rate of one and one-half

has recently been before the Court of Appeals for construction, and it was held that that section and section 190 establish a rule to compute the amount of the capital stock on which an assessment is to be made, but not for its valuation,

mills upon each dollar of the appraised capital employed within this state. If such corporation, joint-stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six or more than six per centum upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, a tax shall be charged at the rate of one and one-half mills upon every dollar of the valuation made in accordance with the provisions of this act of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum; provided, however, that a street surface railroad corporation or a steam railroad corporation, or an elevated railroad corporation owning in a city a street surface railroad or an elevated railroad not operated by steam, in cases where the street surface roads or elevated

roads of said owning corporations are operated by another street surface railroad corporation under a lease or otherwise, in so far as the dividends made and declared upon the capital stock of the said owning corporations shall be paid from the gross earnings of the said operating corporation in the form of rent or otherwise, shall only be required under this section to pay a tax of three per centum upon the dividends declared and paid from the moneys received in the form of rent or otherwise from the operating company in excess of four per centum upon the amount of its capital stock, provided, however, that nothing in this section shall relieve the said operating company of any of the liabilities imposed by section one hundred and eighty-five of this chapter. Every corporation, joint-stock company or association organized, incorporated or formed under the laws of any other state or country shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state. (As amended by chap. 558 of 1901.)

**§ 185. Franchise tax on elevated railroads or surface railroads not operated by steam.—** Every corporation, joint-stock company or association operating any elevated railroad or surface

and that such valuation is to be based on the provisions of section 190, and therefore an assessment of the par value is erroneous.<sup>78</sup> Very recently ex-Judge Earl, of the Court of Appeals, sitting as a referee, has determined that the New York State Franchise Tax Law is valid; that it does not violate the home rule section of the State Constitution, nor is it in conflict with the Federal Constitution in impairing contracts, nor is it incompatible with other tax statutes in that the value of the franchise for use of a street cannot be separated from other property values, and that where the corpo-

railroad not operated by steam shall pay to the state for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state, an annual tax which shall be one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by such corporation, joint-stock company or association. Any corporation, joint-stock company or association taxed under this section which has paid a tax to the state for the year ending November first, eighteen hundred and ninety-five, under section three of chapter five hundred and forty-two of the laws of eighteen hundred and eighty, as amended by chapter five hundred and twenty-two of the laws of eighteen hundred and ninety, shall be credited by the comptroller with one-third of the amount so paid in computing the taxes to be paid for the year ending June thirtieth, eighteen hundred and ninety-six.

**§ 190. Value of stock to be appraised.**—In case no dividend has been declared, by a corporation, association or joint-stock company liable to pay a tax under section one hundred and eighty-two of this chapter, the treasurer or secretary of the company, shall, under oath, between the first and fifteenth day of November in each year, estimate and appraise the capital stock of such company upon which no dividend has been declared, or upon which the dividend amounted to less than six per centum at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and shall forward the same to the comptroller with the report provided for in the last section. If the comptroller is not satisfied with the valuation so made and returned he is authorized and empowered to make a valuation thereof, and settle an account upon the valuation so made by him, and the taxes, penalties and interest to be paid the state.

78. People v. Roberts, 168 N. Y. 14, 60 N. E. 1043.

ration owns one or more franchises they may be assessed in bulk; that a precise rule or method of assessing for each franchise was impossible, and the assessors were allowed discretion; and that the State board need not divulge their method of arriving at a value; neither need the law distinctly state the tax; that the assessment at full valuation by the State board, while in some counties other real estate is not assessed at full value, can be remedied in the courts.<sup>79</sup> The right of a domestic railroad corporation to use a high-

79. In his opinion the learned referee said: "This franchise tax takes away nothing granted, and it impairs no contract. The imposition of the tax is not an effort to exact more compensation for the franchises, but to compel the owners thereof to pay, in common with other owners of property, their share of the public burdens. If the argument of the relators is to be carried to its logical results, then the State could never tax any franchise of any kind granted by it without impairing its contracts, and the millions which have been taken from corporations under franchise tax laws in all parts of this country during the past twenty years have been taken in violation of the Federal Constitution, and have been illegally exacted. It is said that these franchises could not be taxed because they were not taxable at the time they were granted. They were not by any law or contract exempted from taxation. They were property of immense value under the protection of the government, and there was no reason in their nature for exempting them from taxation. There is no contract, express or

implied, that they should never be compelled to bear their share of public burdens like other property."

As to the claim that it was impossible to value the franchise, he said: "It is proper to look upon the franchise as real estate, and is not impossible to find a tangible value. These assessors were not bound to view these franchises as abstractions apart from any use to which they could be put, but they had the right to consider, and as faithful officers were bound to consider, the uses for which they were intended in the streets, and to which they had been actually applied. Suppose what constitutes the special franchise of any one of these corporations should be put in the market for sale? Can it be doubted that it would sell for a substantial price, a sum which business men could determine with sufficient accuracy for business purposes? Hence, I think it is clear these special franchises could be assessed for the purposes of taxation. The assessment is undoubtedly attended with great difficulties, but it can be made with such an approximation to accuracy as will

way crossing is a special franchise subject to taxation.<sup>80</sup> Indebtedness of a corporation and its operating expenses should not be deducted in Kentucky in valuing its franchises for taxation purposes.<sup>81</sup> The franchise and property of one corporation cannot be assessed in Wisconsin to another corporation to which they have been transferred, as such franchises are inalienable and cannot be transferred so as to disable the corporation from performing its duties.<sup>82</sup> Under a statute providing that all real and personal estate, whether owned by individuals or corporations, shall be liable to taxation, the mere franchises of the corporation are not taxable.<sup>83</sup> The earning capacity of the franchises of a New Orleans city railroad company is, under the Louisiana statutes, the true statutory basis of their assessment for taxation.<sup>84</sup> In that State the method of assessing other corporations is not sufficient cause for complaint by a street railroad company against the assessment of the value of its franchises based on the proportionate value of the franchise to the total value on which the company pays dividends.<sup>85</sup> The franchise to build

satisfy all the requirements of the law and constitution." And see *People v. Morgan*, 162 N. Y. 654, 57 N. E. 1121; *People v. Morgan*, 55 App. Div. (N. Y.) 265, 62 N. Y. Supp. 823; *People v. Morgan*, 57 App. Div. (N. Y.) 335, 68 N. Y. Supp. 21; *Henderson Bridge Co. v. Kentucky*, 106 U. S. 150, 41 L. Ed. 953.

80. *N. Y., L. & W. Ry. Co. v. Roll*, 32 Misc. Rep. (N. Y.) 321, 66 N. Y. Supp. 748; *W. U. T. Co. v. Taggart*, 141 Ind. 281, 2 Am. & Eng. Corp. Cas. (N. S.) 187, 40 N. E. 1051.

81. *Paducah St. R. Co. v. McCraken Co.*, 20 Ky. L. Rep. 1294, 49 S. W. 178, 9 Am. & Eng. Corp. Cas. (N. S.) 705; *Louisville R. Co.*

v. Commonwealth, 20 Ky. L. Rep. 1509, 49 S. W. 486. And see *Lowell v. Middlesex Co.*, 152 Mass. 375, 9 L. R. A. 356; *State, Central R. Co. v. State Board of Assessors*, 48 N. J. L. 7.

82. *State, Milwaukee St. Ry. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746.

83. *State, Passaic Water Co. v. Patterson*, 56 N. J. L. (27 Vroom) 471, 29 Atl. 185.

84. *New Orleans City & L. R. Co. v. New Orleans*, 44 La. Ann. 1055, 54 Am. & Eng. R. Cas. 297, 11 So. 820.

85. *St. Charles St. R. Co. v. Board of Assessors*, 51 La. Ann. 458, 25 So. 90.

and run a street railway is as much a subject of taxation as any other property; and where there is no express contract against taxation in the charter of the corporation it takes its charter subject to the same right of taxation in the State which applies to all other privileges and property.<sup>86</sup> A short line of incline cable railroad, located wholly within one county, operated by means of a cable and stationary steam power, and chartered under statutes providing for the incorporation of cable or cog railroads for ascending mountain heights with a maximum grade of not less than 1,000 feet per mile, does not come within the provision of statutes authorizing the assessment of railroad property by the State railroad commissioners.<sup>87</sup> And the fact that a company transferred its franchise as to its line of road and retained a portion of the land grant, does not operate as a sale of such lands so retained and subject them to specific taxation under the Minnesota statute.<sup>88</sup>

**§ 9. Taxation of earnings.**— Legislative and constitutional provisions that taxation of property shall be equal and uniform and in proportion to its value are not violated by exacting from railroad corporations in the State a contribution, according to their gross income, in proportion to the number of miles of railroad in the State, to meet the expenses of a railroad commission,<sup>89</sup> and generally it may be said that a tax of a percentage of gross earnings imposed upon railroad

86. New Orleans City & Lake R. Co. v. City of New Orleans, 143 U. S. 192, 36 L. Ed. 121, 12 Sup. Ct. Rep. 406, affg. 40 La. Ann. 587.

87. Lookout Inc. & L. L. Ry. Co. v. King (Tenn. Ch. App.), 59 S. W. 805.

88. Jackson Co. v. Sioux City & St. P. R. Co. (Minn.), 84 N. W. 794.

89. Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. Ed. 1051, 48 Am. & Eng. R. Cas. 595, 12 Sup. Ct. Rep. 255.

companies in lieu of all other taxation is valid.<sup>90</sup> A railroad company whose road is but three miles long and is operated by a locomotive over two miles and by cable for a steep ascent of a mile, but which is organized to transport passengers and freight, is within the Minnesota statute providing that any railroad company owning or operating any line of railroad in the State shall pay a percentage of its gross earnings, as specified, in lieu of all other tax.<sup>91</sup> Taxes assessed upon the gross earnings are taxes upon the property of the railroad within the rule which requires the lessor, and not the lessee, to pay such taxes, especially where the rent to be paid is a certain proportion of the gross earnings, and the tax law directs the lessee to pay the tax and deduct it from rent due the lessor.<sup>92</sup> The substitution of an assessment on gross earnings of a railroad company in lieu of all other taxes on the road and lands granted to the company does not exempt the lands from taxation. It substitutes one method of taxation for another on the terms and conditions specified in the statute for such substitution.<sup>93</sup> But a street railroad company has been held not to be one of the railroads contemplated by the Minnesota statute providing for the taxation of railroad companies by a percentage on their gross earnings.<sup>94</sup>

90. Northern Pac. R. Co. v. Barnes, 2 N. Dak. 310, 53 Am. & Eng. R. Cas. 616, 51 N. W. 386. And see Atlanta & F. R. Co. v. Wright, 87 Ga. 487, 13 S. E. 578.

91. State, Duluth Belt L. R. Co. v. Eleventh Jud. Dist. Ct., 54 Minn. 34, 55 N. W. 816.

92. Vermont & C. R. Co. v. Vermont C. R. Co. (Vt.), 10 L. R. A. 562, 3 Inters. Com. Rep. 488, 46 Am. & Eng. R. Cas. 646, 9 Ry. & Corp. L. J. 302, 21 Atl. 262, 731. And see Phila. & S. M. S. S. F.

Co. v. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200.

93. Traverse Co. v. St. Paul, M. & N. R. Co., 73 Minn. 417, 76 N. W. 217; North P. R. Co. v. Clark, 153 U. S. 252, 38 L. Ed. 706.

94. State v. Duluth Gas & W. Co., 76 Minn. 96, 78 N. W. 1032. As to the New Hampshire statute see State v. Manchester & L. R., 70 N. H. 421, 48 Atl. 1103. As to Maryland statute, U. S. El. P. & L. Co. v. State, 79 Md. 63, 28 Atl. 768.

Although a license fee may be required by the charter of a railroad company, if constitutional or statutory provisions reserve the right to alter, suspend, or repeal corporate charters, a subsequent statute may require the company to pay a percentage of its gross earnings in lieu of the license fee.<sup>95</sup> In Maryland it has been held that a local passenger railway, built along a turnpike road outside the limits of Baltimore, under a contract purchasing the privilege from the turnpike company and for which no street franchise or acquisition of any kind whatever had been conferred by the city, did not, upon the extension of the limits of the city to include a portion of the road, become "a street railway" within the intendment of the statutes imposing a park tax of nine per cent. upon gross receipts from all street railway lines within city limits.<sup>96</sup>

**§ 10. License fees.**—In the absence of constitutional or statutory restrictions, a municipality may impose a license tax upon street cars, and a contract giving to a street railway company the privilege of operating its road in a street for a term of years without any provision that it shall be exempt from license taxes does not preclude the subsequent imposition of a municipal license tax within the contract period, even if it be imposed for revenue purposes and not simply as a police regulation.<sup>97</sup> A license tax of \$10 each per annum upon electric cars which will carry thirty to forty passengers at a time is not unreasonable, where the cars run upon a street passing by extensive steel mills and have an exclusive right through the only available highway connecting two

95. *Mayor v. Twenty-third St. R. Co.*, 113 N. Y. 311.

96. *Baltimore v. Baltimore, etc., R. Co.*, 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503.

97. *Springfield v. Smith*, 138 Mo. 645, 40 S. W. 757. And see *ante*, chap. IV, § 6.

doroughs with a city. The tax may be imposed under a statute empowering the borough to impose it on hacks, carriages, omnibuses, and other vehicles used in carrying persons or property for pay.<sup>98</sup> A street railroad company however is not liable for the license fees for operating its road from the expiration of its grant to the filing of a bill in an action to enjoin it from further operating the road, as it is a mere trespasser from that time.<sup>99</sup> Where the charter of the company provides that it shall pay for each car, over and above all other taxes, a certain sum, the company is liable for a tax imposed by a city ordinance upon each working horse in the city, on each and every one of its horses.<sup>1</sup> A State can always levy an excise tax upon a railroad corporation for the privilege of exercising its franchises within the State, and it may delegate its power so to do to a municipality so that the municipality may impose a license fee upon the privilege of exercising the corporate franchises within its limits.<sup>2</sup> Where the right to impose the license fee exists, the fees may be increased unless a contract preventing such increase exists between the municipality and the company. If, however, the increase is in derogation of the rights of the company, the ordinance imposing it is void.<sup>3</sup> A clause in the charter of a city railroad company that the company shall pay a license fee for each car such as is paid by other passenger railroad companies in the city, namely, \$30,

98. *North Braddock v. Second Ave. Tract. Co. (Pa. C. P.),* 28 Pittsb. L. J. (N. S.) 27.

99. *Cincinnati Inc. Plane R. Co. v. Cincinnati,* 52 Ohio St. 609, 44 N. E. 327.

1. *Montreal St. R. Co. v. Montreal,* 23 Can. S. C. 259.

2. *Maine v. Grand Trunk R. Co.,*

142 U. S. 217, 35 L. Ed. 994, 12 Sup. Ct. Rep. 121, 48 Am. & Eng. R. Cas. 602, 11 Ry. & Corp. L. J. 52.

3. *Mayor v. Third Ave. R. Co.,* 33 N. Y. 42; *State ex rel. Cream City Ry. Co. v. Hilbert,* 72 Wis. 184, 39 N. W. 326; *Johnson v. Philadelphia,* 60 Pa. St. 445.

is not a contract that the license charged for such cars should never exceed \$30; and a subsequent act of sovereignty may increase the license fee to \$50, where power to alter, revoke, or annul any charter of incorporation was vested in the legislature by the Constitution of the State before the company complaining of the increase was incorporated.<sup>4</sup>

**§ 11. Effect of consolidation.**—As has been substantially stated, courts are astute to seize upon evidence tending to show either that exemptions from taxation were not originally intended or that they had become inoperative by changes in the original constitution of the companies. So a consolidation of corporations unto one or more of which an exemption was allowed will be regarded as a new grant of corporate franchises within the meaning of constitutional provisions theretofore existing requiring the property of corporations to whom franchises are granted to be taxed like that of individuals.<sup>5</sup> A constitutional provision that no

4. Union Pass. Ry. Co. v. Philadelphia, 101 U. S. 528, 25 L. Ed. 912.

5. Yazoo & Miss. Val. R. Co. v. Adams, 180 U. S. 1, 45 L. Ed. 395, 28 Sup. Ct. Rep. 240, affg. 77 Miss. 194, 28 So. 956. The Mississippi Constitution of 1890, section 180, made all grants of corporate franchises subject to constitutional provisions requiring the property of corporations to be taxed like that of individuals. And in the case cited it was held that a subsequent consolidation between railroad companies which had exemptions from taxation prior to the adoption of the new Constitution, but which by articles of consolidation agreed to merge and consolidate their prop-

erties, immunities, and privileges, and substitute for their shares, shares in the new company, although there is a clause in the articles providing that the consolidation shall be effected without disturbing the corporate existence of one of the old companies "or the formation of any new distinct corporation, unless such result shall be necessary to give legal effect to this agreement," was practically a new grant of corporate franchises to which the exemptions did not apply, since the effect of the consolidation was to surrender the entire administration of the functions of the constituent companies to a new corporation with new officers. And see *Same v. Same*, 180

"special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly" enters into statutes existing under which consolidations are subsequently made and renders the corporations thus created and the franchises thus conferred subject to repeal and alteration just as if they had been expressly declared to be so by the statute.<sup>6</sup> A franchise tax imposed by the charter of a railroad company upon each share of its capital stock extends to all the shares of a company formed by the consolidation under special statutes of the State, and an adjoining State, of such railroad with a railroad in the latter State, providing that the stockholders of the latter company are constituted stockholders in the former, and not merely to the shares owned by residents of the former State, or to that proportion of all the shares which will equitably represent the portion of the line lying within the former State.<sup>7</sup> Where street improvements were made and the cost of paving that portion of the street occupied by street railway companies was levied as special assessments against the property of the several companies as separate properties, and these different street railways were afterward consolidated and merged into one property and operated as one system, the old companies substantially losing their individuality and identity and the new company assuming the burdens and obligations of the constituent companies, it was held that, as between the consolidated company and the municipal authorities levying such special assessment, the liens arising by reason of the several assessments against the different

U. S. 26, 45 L. Ed. 408, 21 Sup. Ct. Rep. 282, affg. 77 Miss. 780, 28 So. 959.

6. Shields v. Ohio, 95 U. S. (5 Otto) 319, 24 L. Ed. 357. And see

Parker v. Railroad Co., 109 Mass. 506.

7. State, Bain v. Seaboard & R. R. Co. (C. C. E. D. N. C.), 52 Fed. 450.

constituent companies and properties attached to the new property owned and operated by the substituted company as one property in its entirety, and might be enforced by the sale of the property without dismemberment and separating it into fractional properties as it existed before the consolidation.<sup>8</sup>

**§ 12. Special assessments.**—The statutory scheme for municipal corporations generally has been to assess the burdens of street improvements in some form upon the property benefited; but the fact that the rails, ties, and tracks of a street surface railroad are property and subject to taxation

8. *Lincoln St. Ry. Co. v. City of Lincoln*, 84 N. W. 802. In the case cited it was also held that where a mortgage was placed on a street railway property, which property was afterward consolidated with that of another company against which certain liens for taxes levied as special assessments existed, the lien of the mortgage on the property covered thereby could not, without the consent of the mortgagee, be impaired by the agreements and acts of consolidation, and the tax lien on the property consolidated and merged into the new company and with the property mortgaged could not be made prior to the mortgage lien on all the property after consolidation; that the tax and mortgage liens attached to the specific properties embraced in the levy and the mortgage, respectively, and the respective liens and their priorities could be preserved unimpaired only by separating the different properties into their constituent parts as before consolidation and awarding to each a lien according to priority.

In a recent case in New Jersey it appeared that four corporations operating street railroads made a consolidation agreement forming a new corporation; the corporation thus formed consolidated with other companies, forming a new consolidated corporation. It was held that the power of the last corporation to extend its tracks would not be affected even if one of the four original members of the first consolidation was without power to enter into the consolidation agreement for failure to obtain corporate existence, since the consolidation agreement of the other members was sufficient to form a new corporation, and even a *de facto* corporation was able to enter into the consolidation agreement, and hence the second consolidated company was valid and obtained the rights of each of the constituent members, including the power to extend tracks. *In re Trenton St. Ry. Co. (N. J. Ch.)*, 47 Atl. 819.

generally affords no sufficient reason for taxing them for street improvements when the law has not made them specially assessable for such purposes. It is the general custom of municipal corporations, in granting privileges to street surface railroad companies to occupy streets, to impose terms as a condition to the exercise of such right, and such conditions are lawful and may be enforced in some form for the benefit of the municipal corporations making the grants. These conditions frequently refer to the repairs upon the streets or contributions to the public treasury in lieu thereof, and when imposed usually define the right of the municipal corporation to levy taxes, and the limits of the liability of the railroad corporation to pay them. The provision however in a municipal charter "that all property in said city benefited by any improvement" \* \* \* "shall be liable to assessment for such improvement," was not intended to introduce a new class of subjects for taxation, or to extend the powers given by the preceding provisions of the charter.<sup>9</sup> There can be no obligation on the railroad company to contribute to the cost of paving a portion of the roadway outside of its tracks where the improvement does not include the part of the street which the company is required to pave or keep in repair, unless that obligation is rightfully imposed by some agreement it has made with the municipality or as a condition imposed by statute.<sup>10</sup> In Nebraska, the jurisdiction of the municipal council to establish paving districts and to engage in the work of improving and paving the streets therein does not rest upon a petition asking for such improvement, but on

9. *People ex rel. Davidson v. Gilon*, 126 N. Y. 147, 151; *Smith v. City of Buffalo*, 159 id. 427.

10. *Bowditch v. New Haven*, 40 Conn. 503.

the statutory ground that when streets are improved by the city authority it is incumbent upon street railways occupying parts of the streets to pave in conformity therewith the portion they occupy, and upon failure or refusal so to do, the council is authorized to perform the work and by special assessment make the cost thereof a charge on the property of such street railway company.<sup>11</sup> Substantially the same provisions as to street improvements are contained in the charters of municipal corporations generally throughout the United States. Where the charter authorizes the street railroad company to operate its roads in such streets as shall be determined by the town council, with the company's assent, and on compliance with such conditions and under such regulations as the council might impose, an ordinance permitting the company to use certain streets and prescribing the use of a certain kind of rail is not a contract precluding

11. *Lincoln St. Ry. Co. v. City of Lincoln*, 84 N. W. 802. In the case cited it was stated that under the Constitution and the statute requiring the consent of a majority of the electors of a city before a street railway company is authorized to construct and operate a street railway in such city, an ordinance was adopted submitting the proposition of giving their consent to the construction and operation of the proposed street railway to the electors, and providing that the track should be so constructed as to present the least possible obstruction to the ordinary public use of the streets; also that when required, it should conform to the established grades of the streets as then or thereafter to be established when such streets are brought to grade; and that the

company should be subject to all such reasonable regulations in the construction and use of the railway as might be imposed by ordinance. It was held that, assuming that such provisions became a part of the charter of the corporation having the elements of a contract with respect thereto, an exemption from special assessment was not created, and the legislature might impose a liability on the street railway to pave a part of the street occupied by its tracks in conformity with the improvement of the remainder of the street, or, in the event of its neglect or refusal so to do, it might authorize the levy of special assessments or taxes against the property of the company for the costs and expenses necessary to pave such right of way to conform to the remainder of the street improvement.

the council from subsequently changing the rails so as to conform to the street paving, since the regulations which the council may impose are not limited to the time when the road is built.<sup>12</sup> In Louisiana, a street railway company occupying a portion of the street by its roadbed and tracks may be assessed its proportionate share of paving a street just as the property-owners are assessed, and is bound to pay for that portion of the work which its track alone makes necessary; that is, all expense for the portion of the work lying between the exterior rails of the track and for a distance of two feet from and exterior to the track on each side.<sup>13</sup> Quite generally throughout the country, street railroads are required to pay the entire expense for the portion of the work lying between the exterior rails of the track and for a distance of two feet from and exterior to the track on each side;<sup>14</sup> and the Supreme Court of the United States has held that an ordinance of a city in Iowa, authorizing a railway company to lay a street railway on the condition that the company should pave between the rails, is subject to the provision of the Code of that State as to repealing and amending the articles of incorporation and imposing conditions, and does not constitute a contract between the company and the city or the State, the obligation of which is impaired by laying a tax upon the company for paving the space of one foot outside the rails, imposed by statute.<sup>15</sup> In Wisconsin,

12. Pawcatuck Val. St. Ry. Co v. Town Council of Westerly (R. I.), 47 Atl. 691.

13. Shreveport v. Prescott, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664, citing Ottawa v. Carey, 108 U. S. 110, 27 L. Ed. 669. And see Storrie v. Houston St. Ry. Co., 92 Tex. 129, 46 S. W. 796, 44 L.

R. A. 716; Dallas v. Dallas Consol. Tract. Co. (Tex. Civ. App.), 33 S. W. 757; Sanford v. Pawtucket St. R. Co., 19 R. I. 650, 35 Atl. 67, 4 Am. & Eng. R. Cas. (N. S.) 318, 33 L. R. A. 564.

14. See *ante*, chap. 4, § 12.

15. Sioux City Ry. Co. v. Sioux City, 138 U. S. 98, 34 L. Ed. 898,

the legislature is not prohibited from exempting from payment of special city assessments, the property of railroad companies which have paid a license fee provided for in lieu of such assessments, by a constitutional provision making it the duty of the legislature to provide for the organization of cities, and to restrict their power of taxation and assessment so as to prevent abuse in assessment and taxation.<sup>16</sup> A valid assessment is sufficiently shown by the proper assessing officer, although it appears that with his consent and approval another person was employed to do clerical work in writing up the assessment-roll and putting valuations of property thereon, provided it was done either under the personal supervision and direction of the assessor, or that he afterward considered and adopted it.<sup>17</sup> In Kentucky, it makes no difference whether the method prescribed by the charter of a corporation for the assessment of a special tax in aid of the corporation has been followed in the assessment of railroad property, since such property must be assessed as an entirety by the State Board of Railroad Commissioners.<sup>18</sup> Processes by which assessors arrived at the value of street railroad properties are immaterial to affect the validity of its assessment if they finally conclude that it is honestly worth in the market, in cash, the sum assessed.<sup>19</sup>

16 Am. & Eng. R. Cas. 169, 11 Sup. Ct. Rep. 226, 9 Ry. & Corp. L. J. 251.

16. Milwaukee El. R. & L. Co. v. Milwaukee, 69 N. W. 796.

17. Tampa v. Mugge, 40 Fla. 326, 24 So. 489.

18. Vanceburg & S. L. Tp. R. Co. v. Maysville & B. S. R. Co., 63 S. W. 749.

19. Detroit Citizens' St. Ry. Co. v. Common Council of Detroit (Mich.), 85 N. W. 96, 7 Det. Leg. N. 677.



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